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In The

Supreme Court of the United States

October Term, 1977

No. 77-481

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

Petitioners,

—against—

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK, et ano.,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Table of Authorities iii
Opinions Below 1
Jurisdiction 2
Question Presented 2
Statutes Involved 3
Statement of the Case 4
Reasons for Granting the Writ 9
I. The decision of the *en banc* majority below improperly usurps the function of the Comptroller General, as the agent of Congress, to pass upon the propriety of executive expenditures 10
II. There is confusion amongst the executive agencies as to the proper interpretation of the Comptroller General's decisions 15
III. This case involves a novel and timely question of law, upon which this Court has not yet passed 19
IV. The Second Circuit erroneously concluded that the Comptroller General's decisions conflict with *Greene County I* 20
Conclusion 23
Appendices (under separate cover)
Appendix A—Opinion of the Court of Appeals *en banc* 1a
Appendix B—Order of the Court of Appeals granting *en banc* review 15a
Appendix C—Opinion of the panel of the Court of Appeals 18a
Appendix D—Order of the Court of Appeals amending the panel opinion 35a
Appendix E—Order of the Federal Power Commission 38a
Appendix F—Order of the Federal Power Commission on rehearing 42a

Appendix G—Decision of the Comptroller General in *Matter of Costs of Intervention—Nuclear Regulatory Commission* 44a

Appendix H—Letter of the Comptroller General to the Chairman of the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce..... 75a

Appendix I—Letter of the Comptroller General to Hon. William Clay, House of Representatives 87a

Appendix J—Decision of the Comptroller General in *Matter of Costs of Intervention—Food and Drug Administration*..... 100a

Appendix K—Related statutory provisions 123a

TABLE OF AUTHORITIES

Cases

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975) 6, 10, 19, 20

Brunswick v. *Elliott*, 103 F.2d 746 (D.C. Cir. 1939) 13-14

Citizens for a Safe Environment v. *Atomic Energy Commission*, 489 F.2d 1018 (3d Cir. 1974) 14

Doehler Metal Furniture Co., Inc. v. *Warren*, 129 F.2d 43 (D.C. Cir. 1942) 14

Greene County Planning Board v. *F.P.C.*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972) ("*Greene County I*") 2, 5, 6, 8, 9, 11, 20-22

Greene County Planning Board v. *F.P.C.*, 490 F.2d 256 (2d Cir. 1973) ("*Greene County II*") 2, 5

Miguel v. *McCarl*, 291 U.S. 442 (1934) 14

United States ex rel. Carrol Electric Co. v. *McCarl*, 8 F.2d 910 (D.C. Cir. 1925) 14

United States ex rel. L. Margulies & Sons, Inc. v. *McCarl*, 10 F.2d 1012 (D.C. Cir.), *cert. denied*, 273 U.S. 699 (1926) 14

Statutes

Accounting and Auditing Act of 1950, Section 111(d) (31 U.S.C. § 65(d)) 3, 11-12, 15

Administrative Procedure Act, Section 10(e) (5 U.S.C. § 706) 11

Dockery Act of 1894, Section 6 (as amended) (31 U.S.C. § 74) 3, 12, 13, 15

Federal Power Act

Section 2 (16 U.S.C. § 793) 3, 22

Section 308 (16 U.S.C. § 825g) 3, 22

Section 309 (16 U.S.C. § 825h) 21

Section 313(b) (16 U.S.C. § 825*l*(b)) 6

Section 314(c) (16 U.S.C. § 825m(c)) 21

Judicial Code, 28 U.S.C. § 1254(1) 2

Public Works for Water and Power Development and Energy Research Appropriation Act, 1977 (Pub. L. No. 94-355, 90 Stat. 889) 3, 22

Commentary

Comment, *Agency Funding of Indigent Public Interest Intervenors in Administrative Proceedings*, 6 ELR 10052 (1976) 14, 19

Note, *Federal Agency Assistance to Impecunious Intervenors*, 88 Harv. L. Rev. 1815 (1975) 14, 19

Decisions and Opinions of the Comptroller General of the United States

Letter to Chairman, Oversight and Investigations Subcommittee, House Committee on Interstate and Foreign Commerce, Comp. Gen. File No. B-180224 (May 10, 1976) 7, 18

Letter to Hon. William Clay, House of Representatives, Comp. Gen. File No. B-139703 (September 22, 1976) 7

Matter of Costs of Intervention—Food and Drug Administration, Comp. Gen. File No. B-139703 (December 3, 1976) 8, 10-11, 17

Matter of Costs of Intervention—Nuclear Regulatory Commission, Comp. Gen. File No. B-92288 (February 19, 1976) 7, 17, 18, 19-20

Agency Notices and Releases

Civil Aeronautics Board, Reimbursement for Public Interest Representation, Advance Notice of Proposed Rulemaking, 42 Fed. Reg. 8663 (1977) 17

Department of Health, Education and Welfare, Food and Drug Administration, Administrative Practices and Procedures, Advance Notice of Proposed Rulemaking, 41 Fed. Reg. 35,855 (1976) 17

Department of Transportation, National Highway Traffic Safety Administration, Financial Assistance to Participants in Administrative Proceedings, Final Rule and Advance Notice of Proposed Rulemaking, 42 Fed. Reg. 2863 (1977) 16-17

Environmental Protection Agency, Administrative Practices and Procedures, Financial Assistance to Participants in Agency Proceedings; Advance Notice of Proposed Rulemaking, 42 Fed. Reg. 1492 (1977) 17

Federal Communications Commission, Rules and Policies to Facilitate Participation of Indigent Persons in Commission Proceedings, 41 Fed. Reg. 53,019 (1976) 18-19

Federal Energy Administration:

Petition for Special Redress—Consumers Union of United States, Inc., 42 Fed. Reg. 10,891 (1977) .. 18

Petition for Special Redress—Consumers Union of United States, Inc., 42 Fed. Reg. 16,660 (1977) .. 18

Supplemental Order—Consumers Union of United States, Inc., 42 Fed. Reg. 27,027 (1977) 18

Nuclear Regulatory Commission, Financial Assistance to Participants in Commission Proceedings, Statement of Considerations Terminating Rulemaking, 41 Fed. Reg. 50,829 (1976) 18

Other

Payment of Traveling Expenses of Officers' Dependents—Question for Comptroller General, 33 OP. ATT'Y. GEN. 265 (1922) 12-13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Town of Durham, New York and the Association for the Preservation of Durham Valley (collectively referred to herein as the "Durham Petitioners") respectfully request this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, sitting *en banc*, entered in this action on June 30, 1977. Petitioners Greene County Planning Board and Town of Greenville join in this Petition and adopt the arguments set forth herein.

OPINIONS BELOW

The opinion of the Second Circuit *en banc* and the order granting rehearing *en banc*, neither of which have been officially reported, are included as Appendices A and B, respectively,

to this Petition.[1] The opinion of the panel of the Second Circuit, which preceded the *en banc* review and has not been officially reported, is annexed as Appendix C. An order amending the panel opinion in certain respects is annexed as Appendix D. The relevant portions of the orders of the Federal Power Commission (the "FPC") giving rise to this action are annexed as Appendices E and F.[2]

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals *en banc* was entered on June 30, 1977.

QUESTION PRESENTED

Does the FPC have the discretionary authority to reimburse impoverished intervenors in its licensing proceedings for their reasonable attorneys fees and expenses, where the Comptroller General of the United States has determined that such reimbursement is permitted by, and consistent with, the statutes governing the operation of, and expenditure of funds by, the FPC?

Despite the determination of the Comptroller General that reimbursement is permissible,[3] the FPC has denied that it has the authority to make such an award. A panel of the Second Circuit, one judge dissenting, held that the FPC had such

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[1] All Appendices cited in this Petition are included in a separately bound Appendix which has been filed with the Court concurrently herewith.

[2] Two prior reported Second Circuit decisions, in which Petitioners were parties, are related to this action and review many of the background facts. These opinions are: *Greene County Planning Board v. F.P.C.*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972) ("*Green County I*"), and *Greene County Planning Board v. F.P.C.*, 490 F.2d 256 (2d Cir. 1973) ("*Greene County II*").

[3] Four unreported opinions of the Comptroller General of the United States which authorize discretionary reimbursement, by the FPC and other federal agencies, of the fees and expenses of indigent intervenors in agency procedings, and which underlie Petitioners' position on this writ, are annexed as Appendices G-J.

discretionary authority and remanded this action to the FPC for further consideration of Petitioners' reimbursement requests. The Second Circuit *en banc*, in a closely divided vote, reversed the decision of the panel.

STATUTES INVOLVED

Section 111(d) of the Accounting and Auditing Act of 1950 (31 U.S.C. § 65(d)) provides:

> "It is the policy of the Congress in enacting this chapter that—
>
> "(d) The auditing for the Government, conducted by the Comptroller General of the United States as an agent of the Congress be directed at determining the extent to which accounting and related financial reporting fulfill the purposes specified, financial transactions have been consummated in accordance with laws, regulations or other legal requirements, and adequate internal financial control over operations is exercised, and afford an effective basis for the settlement of accounts of accountable officers."

Section 6 of the Dockery Act of 1894 as amended (31 U.S.C. § 74) provides, in pertinent part:

> "Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement."

Pertinent portions of Sections 2 and 308 of the Federal Power Act (16 U.S.C. §§ 793 and 825g) and Title IV of the Public Works for Water and Power Development and Energy Research Appropriation Act, 1977 (Pub.L.No. 94-355, 90 Stat. 889), which also relate to this action, are set forth verbatim in Appendix K hereto.

STATEMENT OF THE CASE

This case arises out of a seven year contested FPC licensing proceeding involving the appropriate routing of a 345 kilovolt high towered power transmission line which the Power Authority of the State of New York ("PASNY") proposed to construct through the heart of the scenic and historic Durham Valley, on the northern edge of the Catskills in Greene County, New York. (R 5648)[4] As originally planned, the transmission line would have cut an ugly swath from Gilboa, in Schoharie County, New York, through the Town of Durham, New York and the Durham Valley, along side of and bisecting the ages-old Susquehana Turnpike (which is listed on the National Register of Historic Places), to a terminus near Leeds, New York in Greene County.

In May 1970, the FPC granted the Durham Petitioners and the Greene County Planning Board leave to intervene in the FPC licensing proceeding concerning PASNY's Gilboa-to-Leeds transmission line, recognizing that their contributions to the proceeding "may be in the public interest." (R 5756)[5] Solely by dint of Petitioners' efforts,[6] the FPC was ultimately persuaded to reject PASNY's original proposed routing for the

[4] Numerals preceded by the letter "R" refer to the record in the court below. The prefix "Tr." refers to the FPC hearing transcript, which comprises the first 4,047 pages of the record. The prefix "Ex." refers to exhibits received at the FPC hearing.

[5] The Town of Greenville was granted leave to intervene one year later. In permitting the Town of Greenville to intervene, the FPC made the same finding of potential benefit to the public interest as it had in the case of the other Petitioners herein.

[6] During the course of the extensive FPC hearings held in this matter, the Durham Petitioners produced numerous highly qualified expert witnesses from a broad spectrum of disciplines to conclusively demonstrate their contention that a transmission line through the Durham Valley would be an environmental and cultural disaster. (The testimony of these experts commences at Tr. 3028 and continues intermittently for several hundred pages thereafter.) In addition, the Durham Petitioners prepared, assembled and introduced in evidence a multitude of documents, studies, photographs and slides — all demonstrating the unique scenic, historical and cultural aspects of the Durham Valley (*e.g.*, Exs. 98-111, 153A-K, 154, 155A-T, 156-161; R 5013-5125, 5360-5428).

line, as well as certain modifications thereof proposed by PASNY and the FPC Staff, and to adopt instead a route with far less adverse cultural, historic and environmental consequences. Even the FPC's Staff noted with approval the "contributions"[7] and "new insights . . . as to the unitary character of Durham Valley . . ." which were provided by the Durham Petitioners' expert witnesses (Staff Reply Brief to the Administrative Law Judge, April 24, 1974 at 13, 24). PASNY itself has admitted that the route finally selected was laid out in part by the Greene County Planning Board (PASNY Brief to the Second Circuit panel (Docket No. 76-4151), October 18, 1976 at 51).

The Durham Petitioners are impecunious. Substantially more than 1,000 hours of attorneys' time were devoted to the Durham Petitioners' efforts to preserve the Durham Valley, in opposition to the determined position of PASNY and the FPC Staff. Thousands of dollars of expenses were incurred by them — all without a penny of recompense. The other Petitioners herein are in similar circumstances and have devoted comparable efforts to this case.

The Petitioners, since 1971, have sought: (i) reimbursement for out-of-pocket expenses incurred on their behalf; (ii) reimbursement for experts' fees and expenses incurred on their behalf; and (iii) payment of a reasonable attorneys' fee to their

[7] These contributions were not made without difficulty. The Second Circuit, in its opinion in *Greene County I*, summarized a number of the procedural difficulties which had confronted Petitioners, including the need to seek judicial relief under the Freedom of Information Act, and stated:

> ". . . . we are constrained to note that the [FPC] at nearly every turn has made it difficult procedurally for the intervenors." 455 F.2d at 417, n. 12.

Later, in his vigorous dissent in *Greene County II*, Circuit Judge Mansfield noted that (i) the Commission's "use of procedural cat-and-mouse games in an effort to avoid a final order amounts to a sham. . ."; (ii) "The twists and rebounds in the FPC's process have already taxed their [the Durham Petitioners'] financial resources [footnote omitted]"; and (iii) ". . . the FPC in its conduct of the hearing has violated both the letter and spirit of an existing Court mandate." 490 F.2d at 260-261.

counsel and reimbursement of out-of-pocket expenses and disbursements incurred by counsel. (R 5840, 5930) Specifically, in *Greene County I,* the Petitioners requested an order requiring the FPC, or in the alternative PASNY, to pay their reasonable fees and expenses at the conclusion of the FPC proceeding. The FPC took the position before the Second Circuit that the application was premature and it "left open the question of whether ultimately to award them [fees] when the proceedings have come to an end." (455 F.2d at 425) The Second Circuit held that:

> ". . . [W]e find ourselves in agreement with the Commission's position that *at this posture of the proceedings* and *under current circumstances,* without a clearer congressional mandate we should not order the Commission or PASNY to pay the expenses and fees of petitioners. . . ." 455 F.2d at 426 (emphasis added).

During the FPC's administrative hearings the Petitioners renewed their reimbursement request. However, this request was denied by the Administrative Law Judge, and this denial was upheld by the FPC. *See* Appendices E and F. In rejecting the Petitioners' reimbursement application, the FPC concluded that it lacked the authority to make such an award, citing the Second Circuit's decision in *Greene County I* and this Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975). The FPC also ruled that, because the Petitioners represented "local towns and landowners who could conceivably have been damaged" by the power line, they were merely "protecting their own interests" and could not make a case for reimbursement as public interest intervenors. (Appendix E, at 40a-41a)[8]

The FPC subsequently denied the Petitioners' petition for rehearing of their reimbursement request. *See* Appendix F. Accordingly, Petitioners sought review in the Second Circuit pursuant to Section 313(b) of the Federal Power Act (16 U.S.C. § 825*l*(b)).

[8] Numerals followed by the letter "a" refer to the consecutively numbered pages of Petitioners' separate Appendix filed herewith.

The Petitioners based their request for review upon the decision of the Comptroller General of the United States in *Matter of Costs of Intervention — Nuclear Regulatory Commission,* Comp. Gen. File No. B-92288 (February 19, 1976), wherein he held that the Nuclear Regulatory Commission had the "statutory authority" to facilitate public participation in its proceedings by reimbursing intervenors for legal fees and other expenses when the agency found that (i) such participation was "required by statute or necessary to represent adequately opposing points of view . . ." and (ii) the intervenor is "indigent or otherwise unable to bear the financial costs of participation in the proceedings." (Appendix G, at 65a) The logic of the Comptroller General's opinion rested on the proposition that:

> ". . . where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available." Appendix G, at 51a.

The Petitioners also relied upon a second opinion of the Comptroller General, set forth in a letter to the Chairman of the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce (Comp. Gen. File No. B-180224, May 10, 1976) which expressly made the holding of the Nuclear Regulatory Commission opinion applicable to the Federal Power Commission and eight other agencies of the federal government. (Appendix H, at 75a-78a)[9]

[9] The Comptroller General subsequently issued two additional decisions reinforcing and elaborating upon his earlier holding, in the Nuclear Regulatory Commission decision and the May 10, 1976 letter, that executive agencies, and particularly the FPC, had discretionary authority to reimburse impecunious intervenors in agency proceedings. These decisions are: Letter to Hon. William Clay, House of Representatives, Comp. Gen. File No. B-139703 (September 22,

On December 8, 1976, a majority of a panel of the Second Circuit held that the FPC had authority to award counsel fees and expenses to the Petitioners, and remanded the case to the FPC "for further consideration of [the Petitioners'] requests for reasonable reimbursement of their litigation expenses." (Appendix C, at 30a) The majority based its holding on the aforesaid decisions of the Comptroller General authorizing such reimbursement, noting that the Comptroller General is "Congress's agent for the purpose of determining the legality of administrative expenditures...." (*Id.* at 28a) Circuit Judge Lumbard, for the majority, added that:

> "Since public hearings are integral to the functioning of an agency such as the FPC, authorization for reimbursement of indigent intervenors who make important contributions in these hearings can reasonably be found in the agency's general statutory mandate. See 16 U.S.C. § 793 ('The commission may make such expenditures . . . as are necessary to execute its functions.') On this basis the Comptroller General's decision is not clearly incorrect and as a consequence the FPC now appears to have authorization to pay intervenors' expenses." Appendix C, at 28a-29a.

By a vote of five to three, the Second Circuit *en banc* reversed the panel's decision.[10] Circuit Judges Gurfein, Meskill and Mulligan joined in Judge Van Graafeiland's main opinion, which held that the rulings of the Comptroller General permitting reimbursement conflicted with the Second Circuit's prior holding in *Greene County I* that "the Federal Power Act did not authorize the making of such an award." (Appendix A, at 3a) Judge Van Graafeiland concluded that "our interpretation must control." (*Id.* at 4a) Chief Judge Kaufman concurred in a separate opinion. He noted the "critical and

1976) and *Matter of Costs of Intervention—Food and Drug Administration*, Comp. Gen. File No. B-139703 (December 3, 1976). Copies of these additional decisions, which were also relied upon by Petitioners in their submission to the Second Circuit *en banc*, are annexed as Appendices I and J, respectively.

[10] Circuit Judges Feinberg and Timbers did not participate in the consideration of whether to hold an *en banc* hearing, or in the determination *en banc*.

important role" that Petitioners have played in this prolonged FPC proceeding. However, he stated that, while "public funding has become necessary to the optimal functioning of the administrative process," he favored "an eschewal of 'judicial lawmaking'" and a resolution of the question by legislation. (Appendix A, at 7a-8a)

Circuit Judges Mansfield and Oakes joined in Judge Lumbard's dissenting opinion, which expressed the view that the Comptroller General's opinions did not conflict with *Greene County I*, and that the Comptroller General, as "Congress' chief agent for guarding the public fisc," had properly determined that the FPC had discretionary authority to make the requested reimbursement. The minority opined that the Comptroller General's "opinions on expenditure issues are comparable to those of any agency in its area of special responsibility, and they are entitled to at least as much deference from courts as is given to an enforcing agency's statutory interpretations. . . ." (Appendix A, at 11a)

REASONS FOR GRANTING THE WRIT

As more fully developed below, the Second Circuit *en banc* majority has usurped a function expressly entrusted by Congress to the Comptroller General — namely, the responsibility to determine the propriety of expenditures by the executive agencies. The Comptroller General, in his statutory capacity as "the agent of Congress" for the purpose of determining the legality of such expenditures, has ruled that the FPC has discretionary authority, under certain conditions, to reimburse impecunious intervenors for their costs of participating in agency proceedings. The Second Circuit, although unable to rule that the Comptroller General's determination was "clearly erroneous", nonetheless has held that the FPC lacks such authority, because the Comptroller General's determination appeared to conflict with its prior ruling in *Greene County I*.[11]

[11] For the reasons set forth in Point IV, *infra*, it is respectfully submitted that the Second Circuit's conclusion that the Comptroller General's position conflicts with the panel's holding in *Greene County I* is in error.

In so holding, the Second Circuit applied an improper standard of review, resulting in an impermissible invasion of the province of the legislative branch.

The issue presented by this petition—the propriety of fee *reimbursement* as authorized by the Comptroller General—is a novel and important one; it is separate and distinct from the question of the propriety of fee *shifting* between private litigants, addressed by this Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). This case is of particular importance since it is apparent that confusion and conflict presently exist between certain of the executive agencies of the federal government as to the weight to be accorded to the Comptroller General's opinions as to fee reimbursement.

I
THE DECISION OF THE EN BANC MAJORITY BELOW IMPROPERLY USURPS THE FUNCTION OF THE COMPTROLLER GENERAL, AS THE AGENT OF CONGRESS, TO PASS UPON THE PROPRIETY OF EXECUTIVE EXPENDITURES

At the heart of this petition is the question of who should determine the propriety of expenditures by executive agencies of the federal government. As discussed in the Statement of the Case, *supra*, the Comptroller General of the United States has determined, in four separate opinions (*see* Appendices G-J), that executive agencies have the statutory authority to reimburse impecunious intervenors in agency proceedings for their reasonable attorneys' fees and other expenses where the agency has determined, in the sound exercise of its discretion, that the intervenors meet certain prescribed conditions.[12] The *en banc*

[12] The standards prescribed by the Comptroller General, which are articulated in greatest detail in his decision in *Matter of Cost of Intervention—Food and Drug Administration*, Comp. Gen. File No. B-139703 (December 3, 1976) (Appendix J), condition reimbursement upon a finding by the agency that (i) "a particular expenditure for participation 'can reasonably be expected to contribute substantially to a full and fair determination of' the issues before it even though the expenditure may not be 'essential' in the sense that the issues cannot be decided at all without such participation," and (ii) the proposed intervenor is "indigent or otherwise unable to finance its participation" in the agency's proceedings. Appendix J, at 113a, 117a.

decision of the Second Circuit effectively renders nugatory this determination without giving any substantive reason therefore except that, in the Second Circuit's view, the Comptroller General's opinions, at least insofar as they concern the FPC, appear to conflict (in fact, no such conflict exists) with the holding of the Second Circuit in *Greene County I*.

The Second Circuit claimed to find the authority to overrule the Comptroller General in Section 10(e) of the Administrative Procedure Act (5 U.S.C. §706), which provides that ". . . the reviewing court shall decide all relevant questions of law," and "interpret constitutional and statutory provisions" and shall "hold unlawful and set aside agency action . . . in excess of statutory jurisdiction, authority or limitations . . ." (Appendix A, at 4a). It then refused to "abdicate the responsibility thus conferred by holding that the authority of the Federal Power Commission is to be determined by the Comptroller General's determination of the law rather than our own." (*Id.*)

In reaching this conclusion, the Second Circuit far overstepped the bounds of its authority to review determinations of the Comptroller General, and wholly ignored the fact that Congress has given him, and not the judiciary, express statutory authority to pass upon the propriety of expenditures by the executive agencies. He is given this authority by Section 111(d) of the Accounting and Auditing Act of 1950 (31 U.S.C. §65(d)), which explicitly provides that:

> "It is the policy of the Congress in enacting this chapter that —

> "(d) The auditing for the Government, conducted by the Comptroller General of the United States *as an agent of the Congress* be directed at determining the extent to which . . . *financial transactions have been consummated in accordance with laws, regulations or other legal requirements.* . . . "(emphasis added)

In simplest terms, Congress has designated the Comptroller General as its agent for determining whether federal expenditures have been made in accordance with the language and intent of the statutes passed by Congress. His determination in such matters is preeminent, unless it is so arbitrary or capricious as to be clearly erroneous.

Necessarily, the fulfillment of this role by the Comptroller General requires him to engage in the review and interpretation of statutes. This is clearly evidenced by the provisions of Section 6 of the Dockery Act of 1894 (31 U.S.C. §74) which, in the course of completely reorganizing the system of governmental auditing and accounting, provided that:

> "Disbursing officers, or the head of any executive department, or other estasblishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon *any question involving a payment to be made by them or under them,* which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement." (emphasis added)

In addition, the Attorney General has held, in a series of opinions following the enactment of the Dockery Act, that the Comptroller General may properly engage in statutory interpretation in the course of determining the propriety of executive expenditures. For example, in *Payment of Traveling Expenses of Officers' Dependents— Question for Comptroller General,* 33 Op. Att'y. Gen. 265 (1922), the Attorney General declined to answer an inquiry from the Secretary of the Navy concerning the authority of the Department of the Navy to pay the

traveling expenses of officers' dependents to and from stations outside the continental United States. Instead, the Attorney General directed the Secretary of the Navy to submit his inquiry to the Comptroller General. Citing what is now 31 U.S.C. §74, the Attorney General ruled:

> "The above-quoted section [§74] places an *obligation* on the Comptroller of the Treasury [now the Comptroller General] to render a decision upon any question involving a payment to be made by or under the head of any Executive Department, and *contemplated the construction by him of statutes.* 21 Op. [Atty. Gen.] 178, 181 [1895].
>
> "The [Comptroller General] is charged with the duty of rendering decisions upon questions involving payments to be made by or under the direction of the head of an Executive Department, *and his decision is final and conclusive as to all executive officers.* 22 Op. [Atty. Gen.] 581 [1899]; 23 Op. [Atty. Gen.] 468 [1901]; 25 Op. [Atty. Gen.] 185 [1904]." 33 Op. Atty. Gen. at 267 (emphasis added).

It is clear that judicial review of decisions by the Comptroller General as to the propriety of expenditures by the Executive branch of the Government is governed by the same "clearly erroneous" standard that guides courts in passing upon actions by the federal agencies within their spheres of expertise. Thus, in *Brunswick v. Elliott,* 103 F.2d 746 (D.C. Cir. 1939), the Secretary of State, acting upon the advice of the Comptroller General, refused to pay a retirement annuity to a retired Foreign Service officer who had subsequently obtained other gainful government employment. The retired Foreign Service officer sought injunctive relief ordering, among other things, that the Secretary of State pay him his annuity and that the Comptroller General be enjoined from interfering with or preventing such payment. The District Court denied the injunctive relief requested and dismissed the complaint, and the Court of Appeals affirmed. Even though the Court of Appeals noted that the substance of the Comptroller General's advice

was "not free from reasonable doubt" (103 F.2d at 750), it nonetheless held:

> "There can be no doubt that the matter came within the jurisdiction of the Comptroller General. The Budget and Accounting Act of June 10, 1921, 42 Stat. 20, 31 U.S.C.A. §1 et seq., provides that . . . *the Comptroller General shall, upon request of a proper officer, render a decision such as that which is involved in the present case.*
>
> "When the fact of appellant's double compensation came to [the Comptroller General's] attention, therefore, *it became his duty to inquire into the matter and answer the question thus presented. Unless the answer to this question was so free from doubt as to require no exercise of judgment or discretion,* his duty in the premises was not merely ministerial and an injunction to restrain him from acting as he has done would be improper." *Id.* at 748-749 (footnotes omitted; emphasis added).[13]

See also Doehler Metal Furniture Co., Inc. v. Warren, 129 F.2d 43 (D.C. Cir. 1942); *United States ex rel. L. Margulies & Sons, Inc. v. McCarl,* 10 F.2d 1012 (D.C. Cir.), *cert. denied,* 273 U.S. 699 (1926); *United States ex rel. Carrol Electric Co. v. McCarl,* 8 F.2d 910 (D.C. Cir. 1925). Significantly, the *Brunswick* court stated that the Comptroller General's decision necessarily "was required to be based upon an interpretation of statutes. . . ." *Id.* at 750 (emphasis added).[14]

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[13] This Court's decision in *Miguel v. McCarl,* 291 U.S. U.S. 442 (1934), cited by the Second Circuit majority *en banc,* is not to the contrary, since in that case the Comptroller General's ruling was found to be clearly contrary to law.

[14] The weight to be given a decision of the Comptroller General in a case such as the present one is further demonstrated by the remarks of the Third Circuit in *Citizens for a Safe Environment v. Atomic Energy Commission,* 489 F.2d 1018, 1022 n.3 (3d Cir. 1974) (*dictum*) and by the observations in Note, *Federal Agency Assistance to Impecunious Intervenors,* 88 Harv. L. Rev. 1815, 1827-1828 (1975). *See also* Comment, *Agency Funding of Indigent Public Interest Intervenors in Administrative Proceedings,* 6 ELR 10052 (1976).

In the present case, the Comptroller General has clearly determined, in response to proper requests both by executive agencies (*see* Appendices G and J) and by a *committee of Congress* (*see* Appendix H), that a number of federal agencies, specifically including the FPC, may properly expend public funds to pay an indigent intervenor's expenses in an agency proceeding. This was not a mere "ministerial" determination, but a matter expressly addressed by Congress, pursuant to 31 U.S.C. §§65(d) and 74, to the sound discretion of the Comptroller General in his capacity as the chief accounting and auditing officer of the United States. Indeed, this determination operates to bind the General Accounting Office, in the course of its audit of the FPC's expenditures, to approve such a payment.

As the panel of the Second Circuit initially recognized, the Comptroller General's reimbursement decision is "not clearly incorrect." (Appendix C, at 28a-29a) Significantly, the *en banc* majority did not dispute this point. Petitioners respectfully submit that, under these circumstances, for the *en banc* majority to hold that the FPC nonetheless is without authority to make reimbursement — in the face of clear statutory language authorizing the Comptroller General, as the agent of Congress, to make this determination — manifestly amounts to an improper exercise of its judicial power and an impermissible infringement upon the province of the legislative branch of our federal government.

II
THERE IS CONFUSION AMONGST THE EXECUTIVE AGENCIES AS TO THE PROPER INTERPRETATION OF THE COMPTROLLER GENERAL'S DECISIONS

Recognizing the importance of the recent decisions of the Comptroller General permitting reimbursement of fees and expenses of indigent agency intervenors, several federal agencies have already moved affirmatively to promulgate rules covering reimbursement of participants in their regulatory and rulemaking proceedings. Other agencies, including, of course,

the FPC, have questioned the extent of their authority, if any, to make reimbursement and have refrained from implementing any reimbursement program pursuant to the Comptroller General's rulings.

Those agencies that have initiated programs have relied upon the opinions of the Comptroller General or the reasoning expressed therein as authority for these new programs. For example, the Department of Transportation ("DOT") has commenced rulemaking proceedings with respect to a department-wide reimbursement program, and has also implemented a one-year "demonstration program" for reimbursing indigent participants in administrative proceedings before the National Highway Traffic Safety Administration ("NHTSA"), a division of the DOT, for their "reasonable out-of-pocket costs of participation such as attorneys fees, expert witness fees, and clerical and travel expenses. . . ." DOT, NHTSA, Financial Assistance to Participants in Administrative Proceedings, Final Rule and Advance Notice of Proposed Rulemaking, 42 Fed. Reg. 2863, at 2865 (1977). With respect to its statutory authority for initiating the NHTSA demonstration program, the DOT stated:

> "*Statutory authority for program.* The DOT has adequate statutory authority to conduct this program of assistance. Under the Department of Transportation Act, 49 U.S.C. §1651, et. seq. and related statutes, the DOT and its component agencies have broad responsibility for safety regulation, energy conservation and the sound development of the various transportation modes. The Comptroller General has held that while 31 U.S.C. §628 prohibits agencies from using appropriate funds except for the purpose for which the appropriation was made, an appropriation made for a particular object, purpose of [sic] program 'is available to finance expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made. . .' 53 Comp. Gen. 351, 364 (1973). See also 50 Comp. Gen. 534, 536 (1971); 44 Comp. Gen. 312, 314 (1964); *Northern States Power Co. v. FPC,* 118 F.2d 141, 143 (7th Cir. 1941)." *Id.* at 2864.

The DOT also placed additional reliance directly on the Comptroller General's Nuclear Regulatory Commission and Food and Drug Administration decisions (Appendices G and J) as authority for the NHTSA's pilot reimbursement program. (42 Fed. Reg. at 2864-2865)

In addition, the Food and Drug Administration ("FDA"), the Civil Aeronautics Board ("CAB") and the Environmental Protection Agency ("EPA") have initiated rulemaking proceedings with respect to reimbursement programs for participants in their administrative activities. In its Advance Notice of Proposed Rule Making the FDA stated:

> "Increasing attention has been given in recent years to the financial barriers to effective public participation in agency proceedings. The Administrative Conference of the United States has recommended that agencies consider measures to facilitate public participation under 1 CFR 305.71-6." Department of Health, Education and Welfare, FDA, Administrative Practices and Procedures, Advance Notice of Proposed Rule Making, 41 Fed. Reg. 35,855 (1976).

The FDA concluded:

> "Authority to compensate intervenors is inherent in FDA's broad regulatory powers, its Congressionally mandated hearing procedure, and the wide discretion afforded in its appropriations legislation. It is barred neither by FDA's authorizing legislation nor its appropriations authority." *Id.* at 35,859.[15]

The Advance Notices of Proposed Rulemaking of the EPA (42 Fed. Reg. 1492 (1977)) and the CAB (42 Fed. Reg. 8663 (1977)) contain statements substantially the same as those quoted from the FDA Advance Notice.

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[15] The FDA's proposed reimbursement program would permit compensation for "reasonable attorneys fees, expert witness fees, and other reasonable costs of participation incurred" by indigent participants (as defined therein) in the agency's proceedings.

Finally, the Federal Energy Administration ("FEA"), in connection with certain specific proceedings, has allowed indigent public interest intervenors to apply for, and has granted, funds from its general budget to defray such intervenors' fees and other costs of participation in FEA proceedings. The FEA expressly relied upon the Comptroller General's Nuclear Regulatory Commission decision and his May 10, 1976 letter as authority to make such expenditures. *See* FEA, Petition for Special Redress—Consumers Union of United States, Inc., 42 Fed. Reg. 10,891 (1977). *See also* FEA, Petition for Special Redress—Consumers Union of United States, Inc., 42 Fed. Reg. 16,660 (1977) *and* FEA, Supplemental Order—Consumers Union of United States, Inc., 42 Fed. Reg. 27,027 (1977).

In contrast to the position taken by the DOT, FDA, EPA, CAB and FEA, the Nuclear Regulatory Commission — itself the object of the Comptroller General's seminal reimbursement decision — while accepting the Comptroller General's ruling as to its legal authority to make reimbursement, has taken the position that it would not institute any reimbursement program in the absence of express Congressional authorization. Nuclear Regulatory Commission, Financial Assistance to Participants in Commission Proceedings, Statement of Considerations Terminating Rulemaking, 41 Fed. Reg. 50,829, 50,830-31 (1976).[16] Similarly, the Federal Communications Commission has stated that it has "no doubt whatsoever" as to its authority to reimburse indigent intervenors for their attorneys' fees and expenses, but has opted nonetheless to provide only limited aid (in the nature of free transcripts and modified filing and other procedural requirements) unless Congress provides express

[16] It is worth noting, however, that the NRC simultaneously announced its intention to seek a $200,000 special appropriation from Congress in order to permit it to render financial assistance to indigent participants in one particular NRC proceeding (known as the "GESMO" proceeding) which it believes to be "of singular importance." Nuclear Regulatory Commission, Financial Assistance to Participants in Commission Proceedings, Statement of Considerations Terminating Rulemaking, 41 Fed. Reg. 50,829, at 50,834-35.

authorization for more extensive relief. Federal Communications Commission, Rules and Policies to Facilitate Participation of Indigent Persons in Commission Proceedings, 41 Fed. Reg. 53,019, at 53,021 (1976). The FPC, of course, has consistently maintained that in no case and under no circumstances does it have the authority to make reimbursement.

This Court should grant the requested writ of certiorari in order to resolve the apparent confusion amongst the federal agencies as to the weight to be given the Comptroller General's reimbursement decisions.

III

THIS CASE INVOLVES A NOVEL AND TIMELY QUESTION OF LAW, UPON WHICH THIS COURT HAS NOT YET PASSED

The propriety of reimbursement of the fees and expenses of indigent advocates of the public interest is clearly a timely issue. *See* Note, *Federal Agency Assistance to Impecunious Intervenors,* 88 Harv. L. Rev. 1815 (1975); Comment, *Agency Funding of Indigent Public Interest Intervenors in Administrative Proceedings,* 6 ELR 10052 (1976). Recently, in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), this Court had occasion to consider the question of fee *shifting* from one private adversary to another and declined to alter the so-called "American Rule" that, absent a statute or enforcible contract providing for fee shifting, private litigants must bear their own attorneys' fees. However, this Court has not previously addressed the distinctly different issue presented here — the propriety of the Comptroller General's determination authorizing fee *reimbursement* by a federal governmental agency, from its appropriated funds, to an impoverished participant who represents a vital interest in, and makes an important contribution to, an agency proceeding.

As the Comptroller General correctly noted in his Nuclear Regulatory Commission decision (Appendix G, at 63a-65a), fee reimbursement, unlike fee shifting, does not penalize un-

successful litigants. Nor does it in any meaningful way increase the costs incurred by entities regulated by our federal agencies.[17] Finally, fee reimbursement does not involve any element of compulsion by or against any party; indeed, under the Comptroller General's decisions, the question of whether, and how much, to reimburse an intervenor is left to the sound discretion of the forum agency.

As the Second Circuit panel noted:

> "Where environmental issues are involved, a salutary public interest is served if the parties affected have the opportunity to express their views. Otherwise, the [FPC] could be limited to the information made available to it by the power companies and business interests directly involved." Appendix C, at 29a.

The Durham Petitioners respectfully submit that the importance and timeliness of the issue involved in this case, and the clear distinction between fee reimbursement and the type of fee shifting involved in *Alyeska,* make this case an appropriate one for the exercise of this Court's certiorari jurisdiction.

IV

THE SECOND CIRCUIT ERRONEOUSLY CONCLUDED THAT THE COMPTROLLER GENERAL'S DECISIONS CONFLICT WITH GREENE COUNTY I

The Second Circuit's *en banc* decision was premised on the assumption that the Comptroller General's recent decisions concerning reimbursement were in irreconcilable conflict with

[17] Of course, to the extent that any increased operating costs might be recouped either from, say, the public at large or from the entities regulated by a particular agency, some *de minimis* financial cost might be fall the broad classes of all taxpayers or all agency licensees as a result of the exercise, by an agency, from time to time, of its discretionary authority to reimburse an indigent intervenor's expenses. However, such a miniscule cost clearly bears no resemblance whatsoever to the direct and substantial financial impact which would result to a particular litigant (or litigants) as a result of fee shifting.

the decision rendered by a panel of that court in January 1972 in *Green County I.* The *en banc* majority stated:

> ". . . We are thus met squarely with the issue of whether this Court's interpretation of the Federal Power Act or that of the Comptroller General shall control the disposition of this appeal. We hold that our interpretation must control." Appendix A, at 4a.

In fact, the *en banc* majority misconstrued both the arguments of the Petitioners in *Greene County I* and the holding of the panel with respect thereto. Petitioners claimed in *Green County I* that an award of fees and expenses was permissible pursuant to Sections 309 and 314(c) of the Federal Power Act, 16 U.S.C. §§ 825h and 825m(c). These statutes deal, respectively, with the FPC's rule making powers and its authority to employ attorneys for its own use. The *Greene County I* panel was unable to find in these statutes any requirement that the FPC pay intervenors' expenses, and concluded:

> ". . . [W]e find ourselves in agreement with the [FPC's] position that *at this posture of the proceedings and under current circumstances,* without a clearer congressional mandate we should not order the [FPC] . . . to pay the expenses and fees of petitioners. . . .
>
> • • •
>
> "Without a showing of compelling need, it would be premature for us to inject the federal courts into this area of administrative discretion, perhaps foreclosing more flexible approaches through agency action or rules." 455 F.2d at 426, 427 (emphasis added).

The "far clearer" Congressional mandate that the Court sought was thus a mandate "far clearer" than that provided by the two statutory provisions relied on by Petitioners in *Greene County I.*

Such a mandate—authorizing precisely the "flexible [approach] through agency action or rules" contemplated in *Greene County I*—has since been given in the form of the recent opinions of the Comptroller General, Congress' agent for

determining the legality of administrative expenditures. Significantly, the authority to reimburse impecunious intervenors is based, under the reasoning of the Comptroller General's recent decisions, upon (i) the statutory provisions authorizing administrative agencies to hold hearings and admit interested parties as participants therein, (ii) the statutory provisions permitting agencies to make such expenditures as are necessary to execute their functions and (iii) the annual appropriations bills which, in the case of each particular agency, authorize use of appropriated funds "for necessary expenses" in carrying out the agency's functions. (Appendix G, at 49a-50a; Appendix H, at 77a-78a) In the case of the FPC, the relevant statutes underlying the Comptroller General's opinions — *none* of which were considered by the panel in *Greene County I* are (i) Section 2 of the Federal Power Act, 16 U.S.C. §793, which authorizes the FPC to make "such expenditures . . . as are necessary to execute its functions," (ii) Section 308 of the Federal Power Act, 16 U.S.C. § 825g, which provides that the FPC in its hearings may admit as a party any "person whose participation in the proceeding may be in the public interest," and (iii) the FPC's 1977 appropriations law (*see* Title IV, Public Works for Water and Power Development and Energy Research Appropriation Act, 1977, Pub. L. No. 94-355, 90 Stat. 889, at 898), which provides the general appropriation to pay "for necessary expenses" for the work of the FPC.

Finally, the issue in this case is distinctly different from that in *Greene County I*, in that it involves the question of the discretionary authority of the agency to make the requested reimbursement. It does not involve compulsory reimbursement, as sought by Petitioners in *Greene County I*. Petitioners here seek only confirmation that the FPC has authority to consider their reimbursement request, and an order that the FPC consider the question of whether the Petitioners fairly meet the standards set forth in the Comptroller General's opinions to qualify for reimbursement.

CONCLUSION

For the reasons set forth herein, a writ of certiorari should be granted and the judgment below should be reversed.

Dated: September 27, 1977

Respectfully submitted,

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Supreme Court, U. S.
FILED
SEP 27 1977
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1977

No. 77-4814

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

Petitioners,

—against—

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK, ET ANO.,

Intervenors.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 27, 1977

TABLE OF CONTENTS

Appendix A - Opinion of the Court of Appeals en banc 1a

Appendix B - Order of the Court of Appeals granting en banc review . . . 15a

Appendix C - Opinion of the panel of the Court of Appeals 18a

Appendix D - Order of the Court of Appeals amending the panel opinion . . 35a

Appendix E - Order of the Federal Power Commission 38a

Appendix F - Order of the Federal Power Commission on rehearing . . . 42a

Appendix G - Decision of the Comptroller General in Matter of Costs of Intervention - Nuclear Regulatory Commission 44a

Appendix H - Letter of the Comptroller General to the Chairman of the Oversight and Investigations

Subcommittee of the House
Committee on Interstate
and Foreign Commerce 75a

Appendix I - Letter of the Comptroller
General to Hon. William
Clay, House of Representatives . 87a

Appendix J - Decision of the Comptroller
General in Matter of Costs
of Intervention - Food and
Drug Administration 100a

Appendix K - Related statutory provisions . . 123a

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1516, 1517—September Term, 1976.

(Submitted March 25, 1977 Decided June 30, 1977.)

Docket Nos. 76-4151, 76-4153

GREENE COUNTY PLANNING BOARD, et al.,

Petitioners,

—v—

FEDERAL POWER COMMISSION,

Respondent.

POWER AUTHORITY OF THE STATE OF NEW YORK, et ano.,

Intervenors.

ON REHEARING EN BANC

Before:

KAUFMAN, *Chief Judge,*
LUMBARD, MANSFIELD, MULLIGAN, OAKES, GURFEIN,
VAN GRAAFEILAND and MESKILL, *Circuit Judges.**

Petition for review of that portion of an order of the Federal Power Commission denying requests of Greene County Planning Board, Town of Greenville, Town of Dur-

* Judges FEINBERG and TIMBERS did not participate in the consideration or determination of this rehearing.

ham and Association for the Preservation of Durham Valley for payment of litigation expenses.

Petition denied by court sitting en banc.

ROBERT J. KAFIN, Glens Falls, N. Y., *for Petitioners Greene County Planning Board and Town of Greenville.*

BARRY H. GARFINKEL, New York, N. Y., *for Petitioners Town of Durham, et al.*

PHILIP R. TELLEEN, Washington, D. C. (Drexel D. Journey, General Counsel, Robert W. Perdue, Deputy General Counsel. Allan Abbot Tuttle, Solicitor, McNeill Watkins, II, of Counsel), *for Respondent Federal Power Commission.*

SCOTT B. LILLY, New York, N. Y. (John C. Mason, Vito J. Cassan, Vincent J. Tobin, of Counsel), *for Intervenor Power Authority of the State of New York.*

RONALD A. ZUMBRUN, ROBERT K. BEST, RAYMOND M. MOMBOISSE, Sacramento, California (Albert Ferri, Jr., Glenn E. Davis. Lawrence P. Jones, Washington, D. C., of Counsel), *for Amicus Curiae Pacific Legal Foundation.*

VAN GRAAFEILAND, *Circuit Judge:*

After six years of litigation over the construction of a power line in Greene County, New York, the dispute between the parties has resolved itself into the issue of whether the Federal Power Commission is authorized to award counsel fees to petitioners who opposed the construction.

In 1972, when this case was before us on a prior appeal, we held that the Federal Power Act did not authorize the making of such an award. *Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 412, 426 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972). Following that decision, further hearings were held before the Commission, at the conclusion of which it denied petitioners' requests for counsel fees and expenses. Relying upon our ruling and upon the Supreme Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), the Commission found that it was not empowered to grant petitioners' requests. It also said in its opinion (No. 751, January 21, 1976):

> These intervenors are protecting their own interests, and we see no reason to grant them fees and expenses. If they were generally allowed, a large financial burden would be imposed on this Commission and the taxpayer or upon the utility involved and inevitably on its rate payers. In the absence of a mandate in the statute we are loath to attempt such an expensive departure from past practice.

Upon appeal, a panel of this Court, with one judge dissenting, reversed that portion of the order disallowing the applications for fees and remanded to the Commission for further consideration of petitioners' requests.[1] Petitions for en banc consideration were granted solely as to this issue and a majority of the Court, sitting en banc, hold that the petition for review of that portion of the Commission's order denying an award of attorneys' fees should be denied.

In arguing for remand, petitioners rely upon an in-

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1 The panel opinion left intact the orders of the Federal Power Commission which authorized construction of an electrical transmission line by the Power Authority of the State of New York.

terpretation of the Federal Power Act by the Comptroller General of the United States which is contrary to our own. In *Matter of Costs of Intervention—Nuclear Regulatory Commission,* B-92288 (Feb. 19, 1976), the Comptroller General held that the NRC had statutory authority to pay the legal expenses of intervenors. In a subsequent letter addressed to the Oversight and Investigations Subcommittee of the House of Representatives' Committee on Interstate and Foreign Commerce, the Comptroller General stated that this opinion was applicable to nine other agencies, including the Federal Power Commission. We are thus met squarely with the issue of whether this Court's interpretation of the Federal Power Act or that of the Comptroller General shall control the disposition of this appeal. We hold that our interpretation must control.

Congress has specifically provided that "[t]o the extent necessary to decision . . . the reviewing court shall decide all relevant questions of law," and "interpret constitutional and statutory provisions" and shall "hold unlawful and set aside agency action . . . in excess of statutory jurisdiction, authority or limitations. . . ." 5 U.S.C. § 706; *see Mulry* v. *Driver,* 366 F.2d 544, 549 (9th Cir. 1966). We are not prepared to abdicate the responsibility thus conferred by holding that the authority of the Federal Power Commission is to be determined by the Comptroller General's interpretation of the law rather than our own.

31 U.S.C. § 74 permits the head of an executive department, in his discretion, to apply to the Comptroller General for a commitment in advance that the General Accounting Office will not question the validity of a specific disbursement in passing upon the account of that department.[2] A commitment given in response to such a request

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2 The Federal Power Commission has never deemed itself authorized to pay the legal fees of private litigants and has sought no commitment from the Comptroller General as to the validity of such payments.

operates as a form of estoppel against subsequent challenge by the GAO. It is not, however, a binding legal opinion, but one which may be contested in the courts. *United States ex rel. Brookfield Construction Co. v. Stewart*, 234 F.Supp. 94, 100 (D.D.C.), *aff'd*, 339 F.2d 753 (D.C. Cir. 1964). It is for the courts to determine the intent of Congress as expressed in its legislative enactments. In making this determination, as we do in this case, we interfere in no way with the authority of the Comptroller General to approve or disapprove disbursements made by executive agencies. We simply hold that the Federal Power Commission has no statutory authority to make the disbursements in question. *Cf. Miguel v. McCarl*, 291 U.S. 442 (1934).

We note that in *Matter of Costs of Intervention—Nuclear Regulatory Commission, supra*, the Comptroller General did not merely hold that the NRC had authority to pay legal expenses of intervenors: he specified the conditions under which payment could be made. He said: (1) NRC must believe that participation by the intervenor is required by statute or necessary to represent adequately opposing points of view; (2) the intervenor must be indigent or otherwise unable to bear the financial cost of participation. Subsequently, although there were no statutory changes, the Comptroller General modified these conditions, holding that payment is authorized if an agency determines that an expenditure for participation "can reasonably be expected to contribute substantially to a full and fair determination" of the issues even though the expenditure might not be essential. *See Matter of Costs of Intervention—Food and Drug Administration*, B-139703 (Dec.

This interpretation of the Federal Power Act by the agency charged with its administration is entitled to great deference from this Court. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

3, 1976). The Comptroller General also perceived no legal objection to the making of awards "solely to ensure that a potentially affected interest is represented" or to giving the "representational role of the participant special weight in deciding whether to provide financial assistance." *Id.*

The authority of a Commission to disburse funds must come from Congress, *Turner* v. *FCC*, 514 F.2d 1354, 1356 (D.C. Cir. 1975); and it is for Congress, not the Comptroller General, to set the conditions under which payments, if any, should be made. No officer or agent of the United States may disburse public money unless authorized by Congress to do so. *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 294 (1941); *Heidt* v. *United States*, 56 F.2d 559, 560 (5th Cir. 1932); *Fansteel Metalurgical Corp.* v. *United States*, 172 F.Supp. 268, 270 (Ct.Cl. 1959). Sums appropriated for the various branches of expenditure in the public service must be applied solely to the objects for which appropriations were made and for no others. 31 U.S.C. § 628. Congress has shown a lively interest in the matter of financial assistance for intervening parties, and legislation dealing with this subject has been introduced in both the 94th and 95th Sessions of Congress.[3] In light of the Supreme Court's very broad language in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, *supra*, 421 U.S. at 257, that "absent statute or enforceable contract, litigants pay their own attorneys' fees", a finding that the Federal Power Commission is empowered to reimburse intervenors for their legal expenses must await appropriate Congressional action.

The petitions for review are denied.

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3 Congress is presently deliberating three bills dealing with the subject of intervenors' costs. They are collectively identified as "Public Participation in Federal Agency Procedures Act of 1977", S.270, H.R. 3361 and H.R. 3362.

KAUFMAN, *Chief Judge* (concurring):

I would add only one brief comment to my brother Van Graafeiland's reasoned opinion. The decision whether to expend public funds to advance an essentially private point of view by its very nature is political and, in a democracy, more appropriately made by the elected representatives of the people. All interested individuals can claim, with utmost sincerity, to represent the "public". Some selection among potential intervenors becomes necessary, therefore, to assure a fair and balanced presentation of the various viewpoints while insuring, at the same time, that the agency does not exceed its financial constraints. Such choices are particularly unamenable to judicial structuring. Indeed, the Supreme Court, in the *Alyeska Pipeline* case, refused to give the courts the right to determine, in the absence of legislative guidelines, which public policies are sufficiently important to warrant exceptions from the general prohibition of fee shifting. And the Comptroller General himself in *Matter of Costs—NRC*, at 8, stated:

> . . . [W]e believe it would be advisable for the parameters of such financial assistance, and the scope and limitations on the use of appropriated funds for this purpose to be fully set forth by the Congress in legislation, as was done in the case of the FTC by the "Magnuson-Moss" Act.

Our three prior decisions in this seemingly interminable case demonstrate the critical and important role that intervenors can play in agency decision-making. I believe that expanded participation by advocates of a variety of public interests before agencies would tend to decrease the number of appeals taken to the federal courts and also the number of cases remanded to agencies because the

record failed to reflect adequate consideration of the concerns of all affected parties. Nevertheless, if Congress is of the view, as I am, that a reliable source of funding is a *sine qua non* to effective public participation in agency proceedings, it should appropriate money to that end. At the same time it should establish a comprehensive and flexible framework that will assure vigorous and independent representation of the public interest and avoid potential abuses.

Thus, while I agree with my dissenting brethren that public funding has become necessary to the optimal functioning of the administrative process, I do not agree that the decision of the en banc majority is an "unfortunate step backward." I would rather characterize it as an eschewal of the inevitable pitfalls of "judicial lawmaking" in the face of congressional inability to resolve the dilemmas posed by these sensitive issues.

LUMBARD, *Circuit Judge*, with whom MANSFIELD and OAKES, *Circuit Judges*, join (dissenting):

I respectfully dissent from the en banc court's decision. In view of the Comptroller General's recent decision on agency reimbursement of intervenors' expenses, I believe we should remand to the FPC for further consideration of the intervenors' request in this case. I do not think the Commission's authority to pay intervenors' litigation expenses has been precluded by our decision in *Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972), or by the Supreme Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

The question raised in *Greene County I* was whether the court should order the Commission to pay for intervenors' expenses. On this issue, the panel concluded:

> [W]e find ourselves in agreement with the Commission's position that at this posture of the proceedings and under current circumstances, without a clearer congressional mandate we should not order the Commission . . . to pay the expenses and fees of petitioners . . . .
>
> . . .
>
> Without a showing of compelling need, it would be premature for us to inject the federal courts into this area of administrative discretion, perhaps foreclosing more flexible approaches through agency action or rules.
>
> 455 F.2d at 426, 427.

In deciding whether the FPC could be required by court order to pay intervenors' expenses the *Greene County I* panel considered two statutes, § 309 of the Federal Power Act, 16 U.S.C. § 825h, which deals with the FPC's rule-making powers, and § 314(c) of that Act, 16 U.S.C. § 825m(c), which authorizes the Commission to employ attorneys for its own use. Finding no such requirement in these statutes, the panel understandably reasoned that a court should not order an agency to disburse funds "without a far clearer congressional mandate," 455 F.2d at 426.

Such caution was appropriate: since the power of the purse belongs to Congress, a court is not free to disburse agency funds whenever it thinks this would be fair. Not only would such judicial freelancing impinge on Congress' constitutional prerogatives, it would also tend to place administrators in the embarrassing position of trying to follow a court's order without any assurance that the funds would be available. For this reason, courts have declined to order agency disbursements over the opposi-

tion of Congress' auditing agent, the Comptroller General, except where the duty to pay is "free from doubt." Compare *Brunswick* v. *Elliot*, 103 F.2d 746, 750-51 (D.C. Cir. 1939), with *Miguel* v. *McCarl*, 291 U.S. 442, 454 (1934).[1]

We are now dealing with a different issue, which is whether the Commission has discretionary authority to pay for intervenors' expenses if it considers such reimbursement to be necessary or desirable. That federal agencies possess such discretionary authority has been recognized by the Comptroller General since the *Greene County I* panel decision, and in the case of the FPC would be based on two statutes that were not considered by that panel, § 308 of the Federal Power Act, 16 U.S.C. § 825g,[2] which deals with Commission hearings, and the statute enacted by Congress which provides a general appropriation to pay for "expenses necessary for the work of the Commission," 90 Stat. 889, 898.[3] As head of the General Accounting Office, the Comptroller General has the power to pass in advance on the legality of administrative expen-

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1 An adverse Comptroller General's ruling does not prevent a claimant from pursuing a suit for money damages against the United States in the Court of Claims. *United States ex rel. Brookfield Construction Co.* v. *Stewart*, 234 F. Supp. 94, 100 (D.D.C.), aff'd 339 F.2d 753 (D.C. Cir. 1964); see, e.g., *Iran Nat'l Airlines Corp.* v. *United States*, 360 F.2d 640, 641-42 (Ct. Cl. 1966).

2 16 U.S.C. § 925g(a) provides:

> (a) Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it . . . . In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

3 The FPC's appropriation was for the fiscal year here in question over $41 million. The Commission is authorized by 16 U.S.C. § 798 to make "such expenditures . . . as are necessary to execute its functions."

ditures. See 31 U.S.C. § 74.[4] Approval by the Comptroller General assures the agency making the disbursement that the necessary funding will not later be withheld by Congress. By his decision in Matter of Costs of Intervention —Nuclear Regulatory Commission, Dec. B-92288 (Feb. 19, 1976), and Matter of Costs of Intervention—Food & Drug Administration, Dec. B-139703 (Dec. 3, 1976), and by his May 10, 1976 letter to the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce, the Comptroller General has categorically held that the FPC has discretionary authority to reimburse expenses of impecunious intervenors who " 'contribute substantially to a full and fair determination of' the issues before it." Costs of Intervention—FDA, supra at 5.

Since the Comptroller General is Congress' chief agent for guarding the public fisc, his opinions on expenditure issues are comparable to those of any agency in its area of special responsibility, and they are entitled to at least as much deference from courts as is given to an enforcing agency's statutory interpretations. see, e.g., *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 272 (1968); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Judicial deference is particularly appropriate here where the Comptroller's General's interpretation is one which limits rather than ex-

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Moreover, under section 6 of the Federal Power Act, 16 U.S.C. § 799, licenses issued by the Commission include the condition of section 10(e) that the licensee pay a share of the Commission's administrative costs. Thus the license is in the nature of a contract under which the licensee expressly agrees to share administrative costs, including fees required to be paid.

4 In passing on the legality of expenditures, the Comptroller General has a "judicial duty" to "determine finally the construction of statutes." See Joint Commission Report, 26 Cong. Rec. at 7483-84 (1894); 21 Op. [Att'y Gen.] 178, 181 [1895].

pands his power over the purse strings. Compare *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973).

The Comptroller General based his decision on the proposition that:

> where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available.

Costs of Intervention—NRC, supra at 3. Since public hearings are integral to the functioning of an agency such as the FPC, authorization for reimbursement of indigent intervenors who make important contributions in these hearings can reasonably be found in the agency's general statutory mandate, see 16 U.S.C. § 793, as well as § 825g. See also Note, *Federal Agency Assistance to Impecunious Intervenors*, 88 Harv. L. Rev. 1815, 1828-29 (1975).

Although express statutory authorization is required before either a court or a regulatory commission can order one litigant to pay a prevailing litigant's expenses on the ground that the prevailing litigant represents the public interest, *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); *Turner* v. *FCC*, 514 F.2d 1354 (D.C. Cir. 1975), fee reimbursement is distinguishable from fee shifting because it involves no direct exercise of compulsion against a private party.[5] *Alyeska* was decided in the context of a long history of cases upholding the "American

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5 Here, indeed, there is not the fee-shifting that was prescribed in *Alyeska*; at least to the extent of the Commission's own general appropriation, note 3 *supra* and accompanying text, any fees paid to intervenors can properly be said to come from the Commission's own

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Rule" against taxing attorneys' fees to the losing party, see 421 U.S. at 247-54; a general statute for taxing costs, 28 U.S.C. § 1920, which was intended to be comprehensive and which omitted attorneys' fees from the list of allowable costs, see 421 U.S. at 255-56; and a number of statutes explicitly authorizing attorneys' fees assessments in certain specific types of cases, see 421 U.S. at 260-62. None of these factors is present here. Because "public interest" intervention is largely a recent development, there is no long-established rule against agency funding for intervenors. Congress has legislated on the subject only twice, see Toxic Substance Control Act, 15 U.S.C. § 2620(4)(c); Clean Air Act § 304(d); moreover, in declining to enact provisions for attorneys' fees payments in proceedings before the Nuclear Regulatory Commission, Congress declared that its intention was to let the NRC decide for itself whether parties should be given reimbursement for attorneys' fees. See House Conference Rep. No. 93-1445, 1974 U.S. Code Cong. & Adm. News at 5550-51. Accordingly, I conclude that it was altogether reasonable for the Comptroller General to find that agency reimbursement of intervenors' attorneys' fees need not await further legislation from Congress.[6]

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funds, not those of the licensee. To the limited extent that this might not be true, moreover, by virtue of the licensee's statutory duty under section 10(e) of the Federal Power Act, 16 U.S.C. § 803(e), to pay a share of the Commission's administrative costs included as a condition of the license which is agreed to by the licensee under section 6, 16 U.S.C. § 799, any "shifting" of fees involved would be done by the contract—the license itself. This is perfectly proper under *Alyeska*, 412 U.S. at 257 ("the general rule that, *absent statute or enforceable contract*, litigants pay their own attorneys' fees") (emphasis added).

6 Despite the fears expressed by my brother Kaufman about "judicial structuring" and "judicial lawmaking," I see no cause for concern here. It would be the administrative agency, and not the court, which in the first instance would determine whether intervenors make a substantial enough contribution to the administrative process to merit a fee award.

The decision of the en banc majority seems an unfortunate step backwards. Public funding for public interest intervenors has become necessary to the optimal functioning of the administrative process. Involvement in administrative proceedings is time-consuming and expensive, and where individual interests are diffuse and noneconomic these costs are a substantial barrier to effective participation.[7] When good citizens are willing to give their time and money to voice a broader public interest and thus to make useful contributions to government decisionmaking, there should be some means for reimbursing their reasonable attorneys' fees, expert witness costs, and other expenses. Otherwise, many good causes will be crippled because of financial limitations on presentation, and many others will go unpled. Intervenors who represent public interests in addition to their own interests have important contributions to make to the regulatory process.[8] Where such intervenors aid an agency in performing its statutory duties, it is only fair that the costs of intervention should be treated as part of the cost of agency administration.

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7 See 88 Harv. L. Rev. at 1819 & n.23.

8 See Leventhal, *Attorneys' Fees for Public Interest Representation*, 62 A.B.A.J. 1134 (1976).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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GREENE COUNTY PLANNING BOARD,
et al.,

Petitioners,

-against-

FEDERAL POWER COMMISSION,

Respondent.

POWER AUTHORITY OF THE STATE
OF NEW YORK, et ano.,

Intervenors.

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76-4151
76-4153

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed by counsel for both the petitioners and respondent, a majority of the court has voted to grant reconsideration en banc limited to the question whether the Federal Power Commission is authorized to reimburse the

intervenors for counsel fees and expenses. The petitions for rehearing en banc are denied in all other respects. The court does not deem oral argument necessary, but directs that additional briefs be filed, as follows:

Petitioners' brief: March 8, 1977

Respondent's brief: March 22, 1977

Petitioners' reply brief: March 25, 1977

The case will be deemed submitted on March 25, 1977.

The en banc court will include Judge Lumbard, a Senior Judge who was a member of the original panel.

Judge Oakes dissents from the court's decision to limit its en banc rehearing to the question of the Federal Power Commission's authority to reimburse intervenors.

Judge Feinberg did not participate in consideration of this case. Judge Timbers did

not participate in the consideration or determination of the petition for rehearing en banc at this stage of the en banc proceedings.

s/ Irving R. Kaufman
Chief Judge

February 15, 1977

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 500 and 501—September Term, 1976.

(Argued October 27, 1976 Decided December 8, 1976.)

Docket Nos. 76-4151 and 76-4153

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK and ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

Petitioners,

—v.—

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK and UNITED BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1249,

Intervenors.

Before:

LUMBARD and VAN GRAAFEILAND, *Circuit Judges,* and BONSAL, *District Judge.**

Petitions for review of final orders by the Federal Power Commission which authorized construction of a power line under 16 U.S.C. § 797(e) and denied requests for payment of litigation expenses.

* Sitting by designation.

Petitions denied in part and granted in part; case remanded to the Commission for further consideration with respect to litigation expenses incurred by some of the parties.

ROBERT J. KAFIN, Esq., Glens Falls, New York, *for Petitioners, Greene County Planning Board and Town of Greenville.*

BARRY H. GARFINKEL, Esq., New York, New York, *for Petitioners, Town of Durham, et al.*

PHILIP TELLEEN, Esq., Washington, D.C. (Drexel D. Journey, General Counsel, Robert W. Perdue, Deputy General Counsel, Allan Abbot Tuttle, Solicitor, McNeill Watkins, II, and David P. Boergers, Attorneys, Federal Power Commission, Washington, D.C., on the brief), *for Respondent.*

THOMAS F. MOORE, JR., Esq., New York, New York (Scott B. Lilly, John C. Mason, Vincent J. Tobin and Arthur J. Kalita, Attorneys, on the brief), *for Intervenor, Power Authority of the State of New York.*

JULES L. SMITH, Esq., Syracuse, New York (Blitman and King, Bernard T. King, Esq., on the brief), *for Intervenor, International Brotherhood of Electrical Workers Local Union 1249.*

LUMBARD, *Circuit Judge:*

These petitions for review under 16 U.S.C. § 825(b) of orders of the Federal Power Commission authorizing con-

struction of an electrical transmission line by the Power Authority of the State of New York and declining to award attorneys' fees and other litigation expenses to various intervenors provide the fourth occasion for this court to review aspects of PASNY's efforts to construct a 35 mile power line through the scenic Durham Valley in Greene County.[1] The Commission issued its opinion and order on January 29, 1976, and on April 27, 1976 it denied a motion to reopen the record.

The Greene County Planning Board and the Town of Greenville (hereinafter "Greene County") assert that the Commission violated its duties under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq., and under the Federal Power Act, 16 U.S.C. §§ 791 et seq., by improperly limiting its analysis of benefits and adverse impacts rather than considering related, pending projects and broader systemic concerns and alternatives. Moreover, petitioners claim the Commission should have reopened the record to consider newly-available data on electricity consumption and other evidence tending to rebut its conclusion that the power line is necessary. They also make various complaints about the adequacy of the Commission's environmental impact statement and the fairness of the hearing conducted by the administrative law judge. We conclude that the Commission has fulfilled its obligations under NEPA and the FPA, and that none of petitioners' other claims warrant reversal.

The Town of Durham and the Association for the Preservation of Durham Valley, intervenors before the Commission who were successful in urging the selection of an alternative route for the power line, join with Greene

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1 *Green County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir.), cert. denied, 499 U.S. 849 (1972); *Greene County Planning Board* v. *FPC*, 490 F.2d 256 (2d Cir. 1973); *Greene County Planning Board* v. *FPC*, 528 F.2d 38 (2d Cir. 1975).

County in asking us to reverse the Commission's refusal to pay for their litigation expenses. Since recent rulings by the Comptroller General indicate that the FPC has authority to grant these reimbursements in appropriate circumstances, we remand to the Commission for further consideration of this issue with respect to the Durham petitioners.

I.

The history of this case dates back to August 1968 when the PASNY applied for approval from the FPC for construction of an 1100-megawatt pumped storage facility near Gilboa, New York. Under 16 U.S.C. § 797(e) the FPC has licensing jurisdiction over such a hydroelectric project and over any transmission lines that are designed for the primary purpose of serving the project. The plan for the Gilboa project was approved by the Commission in June 1969, and it envisaged three 345 kilovolt transmission lines, specifications for each of which would be subject to final review by the Commission. One line was to run southwest to Dehli, one northeast to New Scotland (near Albany), and one southeast for 35 miles to Leeds. Plans for these lines were soon submitted, and the Dehli and New Scotland lines were promptly approved without arousing significant opposition. Environmental controversy arose over the proposed Leeds line, however, and various opponents ultimately received permission from the Commission to intervene. After some reworking of the Leeds proposal by the PASNY, a hearing before Administrative Law Judge William C. Levy commenced on November 9, 1971.

The hearing continued until interrupted by order of this court on January 17, 1972. In *Greene County Planning Board* v. *FPC (Greene County I)*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972), we ruled that the FPC

was violating NEPA by conducting hearings in reliance on the environmental report submitted by the PASNY, instead of first having prepared its own environmental impact statement. Id. at 422. The FPC staff was ordered to prepare its own impact statement to serve as a foundation for cross-examination of PASNY and FPC witnesses at the hearing. In *Greene County I* we also cautioned the Commission not to ignore broad but potentially relevant considerations such as future power demand and supply, alternative sources of power, and impending plans for further power facility construction.

After its petition for certiorari had been denied, the FPC set about the task of complying with this court's mandate by drafting an impact statement, soliciting comments, and preparing a final impact statement. The hearing then recommenced[2] and ran for two and a half months before the record was closed on October 27, 1973. Considerable expert engineering testimony on the need for the transmission line and testimony on its environmental impact was adduced from the PASNY employees charged with the planning and evaluating of the line and also from the employees of the FPC who had prepared the environmental impact statement. The Durham intervenors put on their own environmental experts to testify against the PASNY's preference for a route running through the Durham Valley, which is an especially scenic part of Greene County. The Greene County intervenors sought to call as their own expert witness an environmental engineer employed with the Office of Environmental Planning of the New York State Public Service Commission, but Judge Levy ruled that the state was not required to furnish such expert testimony.

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2 The intervenors again sought a stay of the hearing from this court, this time on the basis of inadequacies in the impact statement; but these challenges were rejected as premature in *Greene County Planning Commission* v. *FPC* (*Greene County II*), 490 F.2d 256 (2d Cir. 1973).

On July 1, 1974, Judge Levy issued his opinion authorizing construction of a Gilboa-Leeds line and selecting as environmentally least harmful a route that skirted the Durham Valley, twenty-nine months later the Commission affirmed.

The Commission's finding of need for the transmission line rested on substantial evidence that the line is necessary if the PASNY is to make optimal use of the Gilboa power storage facility. Engineering opinion was unanimous that the Gilboa-Leeds line would significantly improve the "reliability and stability" of power transmission from the Gilboa project, as well as increasing the "transfer capability" of the overall PASNY network. Thus, the line would ensure access to readily available and inexpensive Gilboa power at times of peak consumption in New York City and other parts of the state, and it would also increase the PASNY's capacity to meet localized peak demands by transferring power as needed to and from various points within eastern New York.

The Commission also decided that the 345 kv transmission line should be constructed with the capability of being expanded to two 345 kv lines or a 765 kv line if the need for the additional transmitting capacity were to arise in the future. The second 345 kv circuit would be most useful if a second hydroelectric storage project presently under PASNY and FPC consideration were to be constructed in the vicinity of Gilboa; upgrading the line to 765 kv would be called for if the PASNY decided to go forward with its plans to upgrade its overall network of lines with which the Gilboa-Leeds line connects; and the Commission concluded that convertibility of the 345 kv line would result in substantial environmental and construction cost savings if either of these likely contingencies were to develop.

The Commission rejected Greene County's motion that it reopen the record in order to consider recent data indi-

cating that electricity consumption in New York City and the rest of the state has significantly and unexpectedly declined, and also that since its construction in 1973 the Gilboa facility has been able to function without mishap and at full capacity by using just the Gilboa-New Scotland and Gilboa-Dehli transmission lines. The Commission said that this new information would not require any modification of its order for the construction of the Gilboa-Leeds line.

II.

The purposes of NEPA are frustrated when consideration of alternatives and collateral effects is unreasonably constricted. This can result if proposed agency actions are evaluated in artificial isolation from one another. Accordingly, an agency is required to consider the full implications of each decision in light of other potential developments in the area, and to prepare a comprehensive impact statement if several projects are significantly interdependent. *Kleppe* v. *Sierra Club*, 49 L. Ed. 2d 576, 590 (1976); *Chelsea Neighborhood Ass'n* v. *United States Postal Service*, 516 F.2d 378, 388 (2d Cir. 1975); *Natural Resources Defense Counsel* v. *Callaway*, 524 F.2d 79, 87-90 (2d Cir. 1975). A balance must sometimes be struck between the importance of going forward with a project presently under consideration and the danger of improperly "piggybacking" several related projects by justifying each of them on the assumption that the others are to be constructed, only to discover later that the overall combination of the projects may do more harm than good.

With these principles in mind, we concur in the FPC's conclusion that the Gilboa-Leeds transmission line is an appropriate unit for an impact statement. On the basis of substantial evidence, the Commission found that the line is necessary in order for the state to make optimal use of the

They object specifically to two rulings: (1) the refusal to allow them to use a state employee as their own expert witness, and (2) the refusal to order the FPC to produce a potentially relevant staff report.

With respect to the first ruling, we do not agree with respondent's assertion that employees of applicants can never be subpoenaed to furnish expert testimony before the FPC. The Administrative Procedure Act, 5 U.S.C. § 555(d), provides that agency subpoenas shall issue "on a statement or showing of general relevance and reasonable scope of the evidence sought." The agency must determine what constitutes "reasonable scope" in each case. *See, e.g., Independent Directory Corp.* v. *FTC,* 188 F.2d 468, 470-71 (2d Cir. 1951). Although *Virginia Petroleum Jobbers Ass'n* v. *FPC,* 293 F.2d 527, 529 (D.C. Cir.), *cert. denied,* 368 U.S. 940 (1961), indicates that opponents of an application are not routinely entitled to free run of the applicant's experts, this does not mean that subpoenas of experts are never appropriate where, for example, the parties seeking the subpoena are unable to afford their own experts, the expert testimony sought would be highly relevant, and the employer-applicant is itself a government entity with a corresponding obligation to serve the broad public interest. Nonetheless, since substantial environmental evidence was already in the record and since the witness, Frank Brugraff, was expert only in the environmental effects of transmission lines, there is little reason to believe that his expert testimony would have affected the Commission's ultimate finding of need for the line. In light of this consideration, we cannot say that curtailment of Burgraff's examination was an abuse of discretion.

The document at issue in the second ruling was a 1969 internal agency report prepared by the FPC staff which concluded that the Gilboa-Leeds line would function for the primary purpose of serving the Gilboa hydroelectric facility

and would therefore be subject to FPC jurisdiction under 16 U.S.C. § 797(e). Certainly, the standards for discovery in an administrative proceeding should not be more restrictive than the standards for disclosure under the Freedom of Information Act, 5 U.S.C. § 552. *See* generally Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda,* 86 Harv. L. Rev. 1047 (1973). Subject to such considerations as confidentiality and the need for unencumbered intra-agency circulation of preliminary views, *see International Paper Co.* v. *FPC,* 438 F.2d 1349, 1358-59 (2d Cir.), *cert. denied,* 404 U.S. 827 (1971); *Ackerley* v. *Ley,* 420 F.2d 1336, 1341 (D.C. Cir. 1969), approved staff reports that are relevant should generally be made available to parties in an agency proceeding. *See, e.g., GSA* v. *Benson,* 415 F.2d 878, 880-81 (9th Cir. 1969). Nevertheless, any failure of discovery here does not warrant reversal since the "primary line" report would have been merely cumulative of the substantial evidence already in the record on this function of the Gilboa-Leeds line.

Petitioners also allege that the environmental impact statement is not based on sufficient independent staff analysis, *see* C.F.R. § 281(b), fails to use an interdisciplinary approach, and is too abstract and too argumentative. We disagree. At the hearing the FPC staff experts testified that, as required by NEPA, *see Greene County I,* 455 F.2d at 420, they had conducted their own evaluation of the need for, and impact of, the transmission line; their reliance on PASNY computer studies and on power-flow data routinely recorded by the PASNY and other electric utilities was not an unreasonable abrogation of their analytical responsibilities. As for the other criticisms, we have read the impact statement and find them to be unpersuasive.

III.

With respect to the intervenors' attorneys' fees and witness expenses the Commission denied all requests for reimbursement, holding that it lacked the authority to make such payments and that none of the intervenors deserved such compensation in any event since they had only been "protecting their own interests." When the same matter was before us in *Greene County I*, we had declined to order the FPC to reimburse intervenors in the absence of express Congressional authorization. 455 F.2d at 426.

While this appeal has been pending, however, the Office of the Comptroller General has announced that in its opinion the FPC does have authority to pay for intervenors expenses. In Matter of Costs of Intervention—Nuclear Regulatory Commission, Decision B-92288 (February 19, 1976), the Comptroller General ruled that the NRC has implied authority to reimburse impecunious intervenors. A letter of May 10, 1976 from the Comptroller General to the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce indicates that this decision is equally applicable to the FPC and eight other agencies: "appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that (1) it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation." [3]

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3 It appears from the record that neither of the Comptroller General's rulings were considered by the Commission when it reached its decision in the instant case. The February 19 ruling on the NRC was issued just one week before Durham's petition for rehearing was filed, and no reference is made to the NRC ruling in either the rehearing petition or the Commission's denial of that petition. The May 10 letter, which

Since the Comptroller General is Congress's agent for the purpose of determining the legality of administrative expenditures, *see* 31 U.S.C. § 65(d), his decision "upon any question involving a payment to be made by [an agency] . . . shall govern the General Accounting Office in passing upon the account containing such disbursement." 31 U.S.C. § 74. The Comptroller General's decision is authoritative and cannot be reversed by a court unless clearly contrary to law. *See Brunswick* v. *Elliott*, 103 F.2d 746, 749 (D.C. Cir. 1939).[4]

Although express statutory authorization is required before either a court or a regulatory commission can order one litigant to pay a prevailing litigant's expenses on the ground that the prevailing litigant represents the public interest, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); *Turner* v. *FCC*, 514 F.2d 1354 (D.C. Cir. 1975), the Comptroller General has concluded that fee reimbursement is distinguishable from fee shifting because it involves no exercise of compulsion against a private party.

Since public hearings are integral to the functioning of an agency such as the FPC, authorization for reimbursement of indigent intervenors who make important contributions in these hearings can reasonably be found in the agency's general statutory mandate. See 16 U.S.C. § 793 ("The commission may make such expenditures . . . as are necessary to execute its functions."). On this basis the Comptroller General's decision is not clearly incor-

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dealt with the FPC specifically, postdates all of the Commission's decisions on reimbursement in this case.

4 *Miguel* v. *McCarl*, 291 U.S. 442 (1934), and *McCarl* v. *Cox*, 8 F.2d 669, 671 (D.C. Ct. App. 1925), cited by Judge Van Graafeiland in his dissent, were cases where the Comptroller General's rulings were clearly contrary to law.

rect and as a consequence the FPC now appears to have authorization to pay intervenors' expenses.[5]

Still, the Commission has implied that even if it had the authority it would not grant fees and expenses to the Durham petitioners because they were only "protecting their own interests," and it is argued that we should affirm on this ground. However, we have some doubts about the fairness of withholding funds from these particular petitioners. All intervenors in agency proceedings are engaged in protecting their perceived self-interests; otherwise they would not bother to intervene. Although the Durham intervenors were acting in their own interests, they were at the same time serving the broader public interest in the preservation of unspoiled scenic countryside. They seem to have played an essential role in the proceedings: it was their evidence and advocacy that appears to have been responsible for persuading the Commission to reject the preference of its own staff and the PASNY for the slightly shorter route running through the Durham Valley. Thus, the Commission was substantially aided in making its determination by the action of the intervenors. Where environmental issues are involved, a salutary public interest is served if the parties affected have the opportunity to express their views. Otherwise, the Commission could be limited to the information made available to it by the power companies and business interests directly involved. Moreover, it seems quite possible that the Durham petitioners could qualify as "indigent" in that their litigation obligations may be unreasonably large in comparison to their financial resources.

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5 Reasonable reimbursement should include reimbursement for out-of-pocket expenses incurred by the intervenors, reimbursement for experts' fees and expenses, payment of reasonable attorneys' fees to intervenors' counsel, and reimbursement for out-of-pocket expenses and disbursements incurred by counsel.

Under these circumstances, where there is a good chance that the Durham intervenors may meet the standards approved by the Comptroller General, we believe the equitable course is to remand to the Commission for reconsideration of its holding in light of the Comptroller General's recent decisions.

We leave it to the Commission to determine whether compensation is appropriate and, if so, what further proceedings are appropriate here in order to provide fair consideration of the Durham petitioners' reimbursement request.[6]

All petitions for review are denied, except that the Town of Durham and the Association for the Preservation of Durham Valley, on which we remand to the Commission for further consideration of these petitioners' requests for reasonable reimbursement of their litigation expenses.

VAN GRAAFEILAND, *Circuit Judge,* Dissenting:

I concur with the majority that the petition for review of Greene County and the Town of Greenville be denied but disagree with my brothers' disposition of the petition of the Town of Durham and the Association for the Preservation of Durham Valley.

In 1972, when this case was before us on a prior appeal, we reviewed the statutory authority of the Federal Power Commission and found no basis "to extend the Commission's power to include paying or awarding the expenses or fees of intervenors." *Greene County Planning Board* v. *FPC,* 455 F.2d 412, 426 (2d Cir.), *cert. denied,* 409 U.S.

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6 We recognize that the task of developing detailed standards for awards to intervenors may best be accomplished through rulemaking or through legislation, but this does not mean that the Durham petitioners are not entitled at least to a reasoned explanation for the withholding of reimbursement in their case.

849 (1972). We are now advised that the Comptroller General, presumably after examining the same statutory provisions, has reached exactly the opposite conclusion. Moreover, appellants, Town of Durham and Association for the Preservation of Durham Valley, now demand that we direct the Federal Power Commission to comply with the Comptroller General's contrary interpretation of the law. I cannot agree that this is a proper role for this Court to play.

I can find no statute which empowers the Comptroller General to issue what is in effect a declaratory judgment clothing the Federal Power Commission with authority to disburse public funds, in the face of the Commission's own determination that it has no such power and this Court's finding in support thereof. See 2 West's Federal Practice Manual (1970) § 1721 at 162. His authority and responsibility as the auditing agent of Congress is to provide a sound accounting structure for the government from the standpoint of effective financial control and independent audit. 31 U.S.C. § 65(d); H.R. No. 2556, 1950 U.S. Code Cong. Service, 3707, 3717. While the Comptroller General has not hesitated to withhold approval of disbursements which he has determined to be "illegal", some of his activities in this field have been said to be based upon "dubious authority" and to represent "questionable policy". T. Morgan, *The General Accounting Office: One Hope for Congress to Regain Parity of Power With the President*, 51 N.C. L. Rev. 1279, 1283 (1973). Be that as it may, his administrative control of the purse strings as the representative of Congress gives him power in this area which has not often been challenged by the courts. *See, e.g., Brunswick* v. *Elliott*, 103 F.2d 746, 750-51 (D.C. Cir. 1939). However, when the Comptroller General has gone beyond the bounds of the authority which may legitimately be

construed to be his, the courts have not hesitated to disregard his holdings. *See Miguel* v. *McCarl*, 291 U.S. 442 (1934); *McCarl* v. *Cox*, 8 F.2d 669, 671 (D.C. Cir. 1925).[1]

No officer or agent of the United States may disburse public money unless authorized by Congress to do so. *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 294 (1941); *Heidt* v. *United States*, 56 F.2d 559, 560 (5th Cir. 1932); *Fansteel Metallurgical Corp.* v. *United States*, 172 F.Supp. 268, 270 (Ct. Cl. 1959). Congress has specifically provided that sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which appropriations were made and for no others, 31 U.S.C. § 628, and has prohibited any officer or employee from involving the government in any obligation for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such obligation is authorized by law. 31 U.S.C. § 665(a). The Federal Power Commission has never deemed itself authorized to pay the legal fees of private litigants, and, a fortiori, has made no request of Congress for an appropriation to pay these fees. Authorization for this payment must come from Congress, *Turner* v. *FCC*, 514 F.2d 1354, 1356 (D.C. Cir. 1975); it cannot be derived from a letter of the Comptroller General addressed to the chairman of a congressional committee.

31 U.S.C. § 74, relied upon by the majority, permits the head of an executive department, in his discretion, to apply to the Comptroller General for a commitment in advance that the GAO will not question the validity of a specific disbursement in passing upon the account of that department. Such commitment has never been requested

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1 For discussions of the question of judicial review, *see* H. Mansfield, *Judicial Review of the Comptroller General*, 20 Cornell L. Q. 459 (1935); also note in 3 Geo. Wash. L. Rev. (1934) at 97.

by the Federal Power Commission in this case, because it has not sought to exercise the authority which the Comptroller General has conceded to it. In reviewing the determination of the Commission which is presently before us, it is for this Court to decide all relevant questions of law and make all requisite statutory interpretations. 5 U.S.C. § 706. *Mulry* v. *Driver*, 366 F.2d 544, 549 (9th Cir. 1966).[4] We abdicate our responsibility when we treat an unsolicited interpretation by the Comptroller General as the equivalent of a Supreme Court ruling, and needlessly inject the Federal Courts into an area of administrative discretion when we compel the Federal Power Commission to conform its practices to what the Comptroller General opines are proper. *Cf. Greene County Planning Board* v. *FPC*, *supra*, 455 F.2d at 427.[5]

Even if my brothers are correct in holding that we must require the Federal Power Commission to follow the Comp-

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4 In so doing, we should not overlook the Commission's own interpretation of its statutory powers and the practices adopted by it pursuant thereto. *See Lucas* v. *American Code Co.*, 280 U.S. 445, 449 (1930).

5 The majority's attempt to find support for the Comptroller General's decision in the provisions of 16 U.S.C. § 793, which authorizes the Commission to make expenditures "necessary to execute its functions", is in clear contradiction of our prior holding in *Greene County Planning Board* v. *FPC*, *supra*, 455 F.2d 412. A commission's "functions" cannot exceed its powers. The administrative powers of the Federal Power Commission are set forth in section 309 of the Federal Powers Act, 16 U.S.C. § 825(h), and we held in *Greene* that such powers did not include the paying or awarding the expenses or fees of intervenors.

We also pointed out in *Greene*, at 427, that in 1971 the Administrative Conference of the United States "refused to adopt a recommendation which would have endorsed the principle of reimbursing the legal expenses incurred by intervenors in administrative proceedings." Since then, Congress has had legislation under consideration which would authorize administrative agencies to award litigation expenses to intervenors, depending on their contribution to the decision making process. *See* S. Rep. No. 94-863, 94th Cong., 2d Sess. (1976). Until Congress, the people's chosen representative, speaks, it is "inappropriate" for this authorization to be granted by anyone else. *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975).

troller General's ruling, we should not go beyond the scope of that ruling. The Comptroller General's stated position is that only the administrative agency involved can make the determination as to whether payment of the expenses of indigent intervenors is appropriate. The Commission, recognizing that Durham intervened for the protection of its own interests, found payment of its attorneys' fees to be inappropriate. We should not require the Commission to reconsider its discretionary determination merely because we have some doubts about its fairness. 5 U.S.C. § 701(a)(2); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608, 620 (2d Cir. 1965). Reimbursement of the expenses of private interests who "may sometimes cloak themselves with a semblance of public interest advocates", *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1006 (D.C.Cir. 1966), is a matter properly within the cognizance of the agency involved.

For the foregoing reasons, I respectfully dissent from that portion of the majority's decision which grants the petition of the Town of Durham and the Association for the Preservation of Durham Valley.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK and ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,	:	
Petitioners,	:	76-4151 and 76-4153
-v-	:	
FEDERAL POWER COMMISSION,	:	
Respondent,	:	
POWER AUTHORITY OF THE STATE OF NEW YORK and UNITED BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1249,	:	
Intervenors.	:	

- - - - - - - - - - - - - - - - - -x

The motion for rehearing by petitioners Greene County Planning Board and Town of Greenville is hereby denied, and it is further ordered that the opinion of this court, filed December 8, 1976, be amended as follows:

On slip opinion page 818, lines 6-7: strike "with respect to the Durham petitioners".

On page 828, line 5: strike "Durham".

line 9: change "petitioners" to "intervenors".

line 12: strike "Durham".

line 20: add a new footnote 6 after "Valley."

Footnote 6 should read: "The intervenors also may deserve some credit for the Commission's decision to use single rather than double sets of towers and a narrower right-of-way." The subsequent footnote must be renumbered.

On page 828, 3rd to last line: after "Durham" insert "and Greene County".

On page 828, lines 2 and 10 and footnote 6, line 3: strike "Durham".

Replace the last paragraph of the opinion with:

"All petitions for review are denied ex-

cept that we remand to the Commission for further consideration of the petitioners' requests for reasonable reimbursement of their litigation expenses."

s/ J. Edward Lumbard
Circuit Judge

s/ Dudley B. Bonsal
District Judge
(Sitting by designation)

I concur in denying the motion for rehearing.

Inasmuch as I dissented from the court's decision to remand for further consideration of the Durham petitioners' reimbursement requests, I must also dissent from the inclusion of the Greene County Planning Board and the Town of Greenville in the remand.

s/ Ellsworth A. VanGraafeiland
Circuit Judge

June 30, 1977

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

LICENSE (Primary Line); NATIONAL ENVIRONMENTAL POLICY ACT, PRIMARY TRANSMISSION LINE; ENVIRONMENTAL PROTECTION (Transmission Line); PRACTICE AND PROCEDURE (Hearing); FEES

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Power Authority of the State of New York	Project No. 2685

OPINION NO. 751

OPINION AND ORDER AFFIRMING AND ADOPTING INITIAL DECISION AUTHORIZING CONSTRUCTION OF PROPOSED GILBOA-LEEDS TRANSMISSION LINE

(Issued January 29, 1976)

DUNHAM, Chairman:

* * *

FEES AND EXPENSES

Durham, with the concurrence of Greene County, the Sierra Club, and Joe Segelman, excepts to the Judge's denial of their motion that PASNY or, in the alternative, the Commis-

sion pay reasonable attorneys' fees and expenses of expert witnesses. In support of its request Durham argues that its participation in the proceedings established a landmark ruling in Greene County I and assisted the Judge by the presentation of highly qualified expert witnesses. In doing so it claims that many hundreds of hours of attorneys' time had been directed to this matter and many thousands of dollars of expenses and fees have been incurred.

Greene County cites Greene County I as recognizing that the Commission could entertain an application for fees and expenses at the close of the proceedings although at that posture of the proceedings it would not order the Commission or PASNY to pay the fees and expenses.

The Court in Greene County I could see no Congressional mandate for requiring the payment of fees and expenses in Section 309 or 314(c) of the Federal Power Act or in Section 102(1) of

NEPA cited by Greene County, but would not make a final determination of that point in view of the procedural disposition. Durham cites Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974) where the court held that environmental groups challenging the Trans-Alaska Pipeline could recover costs and reasonable attorneys' fees. However, it would not assess attorneys' fees against the United States or the State of Alaska. The case was reversed in Aleyska Pipeline Serv. v. Wilderness Soc., ___ U.S. ___, 44L. ed 141, 95 Sup. Ct. 1612 (1975) where the Court held that the Courts had no roving authority to allow counsel fees as costs.

Upon considering this matter further we do not find that Intervenors here have made a case for an award of expenses and fees even if we had the authority to make such an award. The Intervenors represent local towns and land owners who could conceivably have been damaged

by the Gilboa-Leeds line. They had every right to present their cases as have countless other intervenors in cases before the Commission, who intervene for the benefit of local areas either because they do not desire the building of a hydroelectric project or pipeline or because they want it and the energy supplies made available. These intervenors are protecting their own interests, and we see no reason to grant them fees and expenses. If they were generally allowed, a large financial burden would be imposed on this Commission and the taxpayer or upon the utility involved and inevitably on its ratepayers. In the absence of a mandate in the statute we are loath to attempt such an expensive departure from past practice.

* * *

APPENDIX F

LICENSE, PRIMARY TRANSMISSION LINE, FISH AND WILDLIFE, WILDLIFE, RECREATION, POWER POOL, COLLATERAL ATTACK, PRACTICE AND PROCEDURE (Exceptions), PRACTICE AND PROCEDURE (Reopening), STAY, RELIABILITY

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Power Authority of the State of New York) Project No. 2685

OPINION NO. 751-A

OPINION AND ORDER DENYING REHEARING, REOPENING AND STAY

(Issued April 27, 1976)

Per Curiam:

* * *

Durham, et al. reiterate their argument that PASNY or the Commission should reimburse the Intervenors for fees

and expenses. This matter is covered in Opinion No. 751 and further comment is not necessary.

* * *

APPENDIX G

DECISION [SEAL] THE COMPTROLLER GENERAL OF
THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-92288 DATED: February 19, 1976

MATTER OF: Costs of intervention — Nuclear Regulatory Commission

DIGEST: "American rule" explained in Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975) and other court cases provides that in absence of authorizing statute, neither court nor regulatory commission may shift litigation costs such as attorneys' fees among litigants. However, this rule is inapplicable to situation considered in B-139703, July 24, 1972, and current situation which involve availability of regulatory commission's appropriations to provide financial assistance to those who

cannot afford to participate in commission's proceedings but whose participation is determined by commission to be necessary to full and fair proceedings.

The General Counsel of the Nuclear Regulatory Commission (NRC) has requested our decision on the following matter:

"The Nuclear Regulatory Commission and its predecessor, the Atomic Energy Commission, have received several petitions from intervenor groups seeking financial assistance to pay the fees of attorneys and technical experts, and for related expenses of participants in nuclear licensing and rulemaking proceedings. The AEC recognized that those petitions raised a question of its

statutory authority and, beyond that, broad and complex policy issues. The purpose of this letter is to request your advice whether the Nuclear Regulatory Commission possesses the legal authority to provide financial assistance to participants in its adjudicatory and/or rule-making proceedings and, if so, under what limitations."

He advises that the Atomic Energy Commission, the NRC's predecessor agency, in its November 20, 1974 Consumers Power Company decision (Dkt. No. 50-155) expressed itself on the issue of its authority to provide financial assistance as "tentatively inclined to the conclusion that such authority exists."

The General Counsel has provided us with a number of representative letters of opinion from both proponents and opponents of a

tentative proposal to fund indigent intervenors, published by NRC in the Federal Register on August 25, 1975 (40 Fed. Reg. 37056-7). We take no position as to the desirability of funding intervenors as a matter of NRC policy. Insofar as the letters of opinion challenged NRC's legal authority to use its appropriated funds for this purpose we have summarized the principal arguments made and have presented our views in the form of a rebuttal to each argument.

(1) The NRC may not use appropriated funds to assist intervenors in the absence of specific statutory authority therefor.

The NRC was established as an independent regulatory agency under the provisions of the Energy Reorganization Act of 1974 (88 Stat. 1242; 42 U.S.C. §5841) and Exec. Order No.

11,334, effective January 19, 1975. The licensing and related regulatory functions formerly assigned to the Atomic Energy Commission, pursuant to the Atomic Energy Act of 1946, as amended by the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 et seq., were transferred to the NRC. Although there are a variety of NRC proceedings - e.g., NRC rule-making, construction permit, and operating license hearings - for which intervention may be sought, according to a report commissioned by the NRC on "Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings" ("Report"), Boasberg, Hewes, Klores & Kass, July 18, 1975, "the licensing of nuclear electric generating facilities is the heart of the NRC's regulatory activities. It occupies by far the greatest amount of hearing, staff, board, applicant, and inter-

venor time and resources." Accordingly, we examined the legislative authority for construction permit and operating license hearings particularly. 42 U.S.C. § 2239(a) (1970) provides:

> "In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and

shall admit any such person as a party to such proceeding. * * *" (Emphasis supplied.)

Clearly, NRC has ample authority to conduct a hearing and to admit as a party any one whose interests may be affected by the results of the hearing.

NRC generally receives lump-sum appropriations for salaries and expenses. For example, the most recent appropriation act, the "Public Works for Water and Power Development and Energy Research Appropriation Act, 1976," Pub. L. No. 94-180, December 26, 1975, simply provides:

"For necessary expenses of the Commission in carrying out the purposes of the Energy Reorganization Act of 1974 * * *."

B-92288

While 31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held that where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 6 Comp. Cen. 621 (1927); 17 id., 636 (1938); 29 id. 421 (1950); 44 id. 312 (1964); 50 id. 534 (1971); 53 id. 351 (1973).

The question, of course, is whether it is necessary to pay the expenses of indigent

intervenors in order to carry out NRC's statutory functions in making licensing determinations. We believe only the administering agency can make that determination. We note that NRC's regulatory authorities are extremely broad. As the court pointed out in Siegel v. Atomic Energy Commission, 400 F. 2d 778, 783 (1968), Congress enacted "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives."

In view of the above, if NRC in the exercise of its administrative discretion, determines that it cannot make the required determination unless it extends financial

assistance to certain interested parties who require it, and whose participation is essential to dispose of the matter before it, we would not object to use of its appropriated funds for this purpose. This is essentially the same rationale we followed in our decision B-139703, July 24, 1972, in which we held that the Federal Trade Commission (FTC) had authority to pay certain expenses incurred by indigent respondents and intervenors appearing before the Commission in adjudicative proceedings.

(2) The Comptroller General's decision to the Federal Trade Commission, on which the NRC relied in reaching its "tentative conclusion" in its Consumers Power decision, has been overruled by enactment of the "Magnuson-Moss Warranty-Federal Trade Commission

Improvement Act."

The "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act," Pub. L. No. 93-637, 88 Stat. 2183, was enacted on January 4, 1975. Section 202(a) of that Act added a new subsection 18(h) to the Federal Trade Commission Act which provides:

"(h)(1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking

proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

"(2) The aggregate amount of compensation paid under this subsection in any fiscal year to all persons who, in rulemaking proceedings in which they receive compensation, are persons who either (A) would be regulated by the proposed rule, or (B) represent persons who would be so regulated, may not exceed 25 percent of the aggregate amount paid as compensation under this subsection to all persons in such fiscal year.

B-92288

"(3) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed $1,000,000."

This provision was added to the Act by the House-Senate conference committee and there is no pertinent legislative history. However, we believe it is likely that since the new statute substantially formalized FTC's rule-making procedures, the conferees wished to formalize the compensation allowable for intervenors as well, in order to enable them to participate more freely in the proceedings. The new provision broadened the class of persons and expenses eligible for financial assistance and placed overall restrictions on the use of FTC's appropriations. We do not feel that enactment of this provision was

intended to overrule or modify the basis of our 1972 decision so as to reflect on its precedent value in dealing with agencies for which Congress has not enacted a similar statutory provision.

(3) The Congress affirmatively declined to authorize the NRC to pay the expenses of intervenors by deleting a Senate amendment to the Energy Reorganization Act of 1974 which would have provided such authority.

During consideration of the bill which was eventually enacted into the Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1238, an amendment was introduced by Senator Kennedy which would have specifically provided NRC for a period of 3 years with authority to pay expenses of intervenors. 120 Cong. Rec. S15050-15054 (daily ed., August

15, 1974). The amendment was adopted by the Senate but later deleted by the conference committee. In taking that action, the conference committee states in its report:

> "Title V (section 501) provided that the Commission should reimburse parties in Commission proceedings for reasonable attorneys' fees. The Commission was to set a maximum amount allowed for each proceeding. The amounts paid were to be based upon the extent to which the party contributed to the development of facts, issues, and arguments relevant to the proceeding, and upon the party's ability to pay his own expenses.
>
> "The conferees agreed to delete [this section]. The deletion of title V is in no way intended to express an opinion that parties are or are not now

entitled to some reimbursement for any or all costs incurred in licensing proceedings. Rather, it was felt that because there are currently several cases on this subject pending before the Commission, it would be best to withhold Congressional action until these issues have been definitively determined. The resolution of these issues will help the Congress determine whether a provision similar to title V is necessary since it appears that there is nothing in the Atomic Energy Act, as amended, which would preclude the Commission from reimbursing parties where it deems it necessary." (Emphasis added.)

H. Rep. No. 93-1445, 93d Cong., 2d Sess. 37 (1974). We do not agree that the deletion of the Senate amendment indicated congressional

intent to deny the NRC authority to reimburse intervenors. On the contrary, it appears that the members of the conference committee felt that although they wished to await NRC's final position on the matter, quite possibly specific legislation would not be necessary to authorize such financial assistance since they believe that the Atomic Energy Act as amended already contains the necessary authority.

(4) Recent cases have made it clear that there can be no authority to reimburse participants in the absence of a specific statutory provision.

The three cases cited most frequently by opponents to reimbursement authority are Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975); Turner v. Federal Communications Commission, 514 F.2d

1354 (D.C. Cir. 1975); and Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972). The NRC General Counsel also asks specifically whether these cases affect the Commission's authority to reimburse intervenors for expenses. We do not believe they do.

In Alyeska, environmental groups had sued to stop construction of the trans-Alaska pipeline on the grounds, inter alia, that the Secretary of the Interior was violating the National Environmental Policy Act. The court below had ordered attorneys' fees taxed against Alyeska on the theory that the Society had acted as a private attorney general, vindicating important rights of all citizens and ensuring that the governmental system functioned properly. The Supreme Court reversed, noting that Congress had specifically permitted

shifting of attorneys' fees despite the contrary "American rule" in a variety of circumstances, and holding that such specific statutory authorization was a requisite to recovery. The Court further defined the "American rule" as precluding the prevailing litigant from ordinarily being entitled to collect a reasonable attorney's fee from the loser.

In Turner, intervenors appealed from an order of the FCC denying their request that the licensee which sought a renewal of its license be ordered to reimburse their legal expenses. The court said, "Congress has no more extended a 'roving commission' to the FCC than it has to the Judiciary 'to allow counsel fees as costs or otherwise whenever the . . . [Commission] might deem them warranted'." The court then concluded that,

before an agency may order a litigant to bear his adversary's expenses, it must be granted clear statutory power by Congress.

In Greene County, the petitioner/intervenor was successful in compelling the agency to take a broader view of its National Environment Policy Act (NEPA) responsiblities. Nonetheless, on the question of awarding intervenor financing, the court held that "we find ourselves in agreement with the Commission's position that . . . without a clear congressional mandate we should not order the Commission or PASNY [Power Authority of the State of New York] to pay the expenses and fees of petitioners, either as they are incurred or at the close of the proceedings." (Emphasis added.) In both the Alyeska and Turner cases, plaintiffs, the prevailing parties, sought to force their adversaries to pay their costs,

including reasonable attorneys' fees. All the court did, in our view, is to uphold the "American rule," that in the absence of a statutory provision to the contrary, neither a court nor a regulatory commission may shift the costs from one litigant to the other. In the Greene County case, the court said it had no power to order either the opposing litigants or the agency to pay the costs of the intervenors.

In the matter before us, we are not considering whether NRC has the authority to determine whether one participant in its proceedings should pay the expenses of the other, nor are we concerned with whether the persons to whom financial assistance is extended prevail. There is also no question of compelling NRC to pay the expenses of any of

the parties. We hold only that NRC has the statutory authority to facilitate public participation in its proceedings by using its own funds to reimburse intervenors when (1) it believes that such participation is required by statute or necessary to represent adequately opposing points of view on a matter, and (2) when it finds that the intervenor is indigent or otherwise unable to bear the financial costs of participation in the proceedings.

Notwithstanding the above, we believe it would be advisable for the parameters of such financial assistance, and the scope and limitations on the use of appropriated funds for this purpose to be fully set forth by the Congress in legislation, as was done in the case of the FTC by the "Magnuson-Moss" Act, supra. We note that the Joint Committee on Atomic Energy is currently considering S.

1665, 94th Congress, which would accomplish the same objectives as the Kennedy amendment discussed, supra. In addition S. 2715, 94th Congress, which would provide general authority for payment of expenses of intervenors in proceedings subject to the Administrative Procedures Act, 5 U.S.C. § 551 et seq. (1970) as well as in specified types of litigation is now before the Senate Committees on Government Operations and Judiciary.

The NRC has asked that, in addition to deciding the question of its authority to pay costs of intervention directly to participants, this Office advise it as to the legality of expenditure of appropriated funds on certain other forms of assistance to intervenors suggested in chapter VI, "Alternatives to Direct Intervenor Financial Assistance" of a

report on "Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings," prepared for the Commission by the law firm of Boasberg, Hewes, Klores and Kass ("Report").

The discussion of alternatives to direct financial assistance to intervenors in the report is wide ranging and includes numerous suggestions, described in varying degrees of detail. Since it is our understanding that the Commission is not actively engaged in implementing any of these alternatives at this time we will not attempt to discuss each one. We will limit our comments to the following observations on the suggestions we consider to be of greatest significance in the context of availability of NRC funds for expenditure.

Procedural Cost Reductions. Section 201(f) of Pub. L. No. 93-438, supra, transferred to

B-92288

NRC all of the licensing and related regulatory functions formerly performed by the Atomic Energy Commission (AEC). With respect to licensing authority, chapter 10 of the Atomic Energy Act of 1954, 68 Stat. 919, 936, approved August 30, 1954, 42 U.S.C. §§ 2131 et seq. (1970) provided that licenses should be issued by the AEC in accordance with chapter 16 of that Act, now codified at 42 U.S.C. §§ 2231 et seq. Under the authority provided by 42 U.S.C. § 2133 NRC is empowered to issue commercial licenses for nuclear utilization and production facilities "subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes of this chapter." We believe this authority provides NRC with general powers to issue, modify and change its procedural regulations

as it chooses to accomplish the functions it is required to perform with respect to issuance of commercial licenses. Certainly, nothing prevents the Commission from simplifying procedures and eliminating unnecessary or unduly burdensome requirements which increase the cost to parties of participating in licensing proceedings. This suggestion, thus, poses no legal problems.

Access to Technical Information and Staff.

As part of the suggested procedural cost reductions, the "Report" proposes that NRC provide public participants, including intervenors, with what is described as "in house technical expertise, "by granting participants access to technical information and staff, page 135, "Report." As to this suggestion we note that the conferees on the legislation which became Pub. L. No. 93-438, supra, deleted two sections of

the Senate bill, S. 2744, 93d Congress, as passed by the Senate. Section 206 would have provided parties in NRC proceedings with technical assistance and made available studies and reports prepared or to be prepared by or for the Commission, the Energy Research and Development Administration or any other Federal agency, subject to existing laws concerning disclosure. NRC was to fund this assistance and then seek reimbursement unless the party was unable to provide it. Section 209 would have amended the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552 et seq., to provide the public generally with information concerning safety factors. These sections were adopted by the Senate in floor debate, Cong. Rec., daily edition, August 15, 1974, pp. S15034-15047. The conferees did not explain

the deletion of these provisions. See House of Representatives Conference Report 93-1445, supra, p. 37.

NRC must clearly provide such information as provided for by the FOIA. It may provide for easier access to such information. Currently, for example, NRC requires that public participants receive copies of all documents related to a particular facility simultaneously with their receipt by the NRC staff or other parties.

On the other hand, it does not appear that NRC has authority to allow access to its staff to provide a participant's technical expertise. The staff is to serve NRC's needs and may not be used to prepare or assist, other than incidentally, those taking an adversary position in NRC's proceedings.

Provision of Public Counsel. Under the broad mandate to NRC to issue commercial licenses for the utilization and production of atomic materials "subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter" (chapter 10 of the Act of August 30, 1954, as amended, supra, 42 U.S.C. § 2133(a) (1970)), it would appear that the Commission has considerable regulatory flexibility. Thus, as discussed above, if the Commission should find it necessary to the commercial licensing process to establish some form of assistance to participants, including intervenors, who otherwise could not afford to participate, it may do so.

Certainly, however, no authority exists for NRC to supply funds for an

independent Public Counsel outside of the regulatory agency as described in pages 136-138 of the "Report." The "Report" states that at present there is nothing at the Federal level which could be called an independent Office of Public Counsel. We agree with the suggestion on page 138 that the Commission could recommend enactment of legislation to establish special, publicly funded counsel for assistance to participants and intervenors if this appears to be desirable. Proposals for a Consumer Protection Agency are currently being considered by the Congress.

Independent Intervenor Assistance Centers. The comment made above with respect to provision of public counsel is applicable to this suggestion also. Although

we believe the Commission's authority to administer the Atomic Energy regulatory scheme is sufficient to allow provision of some form of assistance to participants, it does not have authority to use its appropriation to finance independent entities not within the jurisdiction and control of the agency where the purpose of those entities is to assist adversary participants in MRC's proceedings.

P.F.KELLER

[Deputy]

Comptroller General
of the United States

APPENDIX H

[SEAL]

COMPTROLLER GENERAL OF THE UNITED STATES
Washington, D.C. 20548

B-180224 May 10 1976

The Honorable John E. Moss, Chairman
Oversight and Investigations Subcommittee
Committee on Interstate and Foreign Commerce
House of Representatives

Dear Mr. Chairman:

This refers to your letter in which you request the advice of this Office, with respect to nine agencies of the Government under study by the Subcommittee on Oversight and Investigations, as to whether public participants in proceedings before those agencies may be assisted in any or all of the following ways:

"(1) the provision of funds directly to participants, (2) modification of procedural rules so as to ease their financial burden on public

B-180224

participatns, (3) provision of technical assistance by agency staff, (4) provision of legal assistance by agency staff, (5) creation of an independent public counsel, and (6) creation of a Consumer Assistance Office such as that now employed by the FCC."

The agencies to which you refer are the Federal Communications Commission, the Federal Trade Commission, the Federal Power Commission, the Interstate Commerce Commission, the Consumer Product Safety Commission, the Securities and Exchange Commission, the Food and Drug Administration, the Environmental Protection Agency, and the National Highway Traffic Safety Administration.

Your letter refers to our decision in the Matter of Costs of Intervention, Nuclear Regulatory Commission (NRC), B-92288,

B-180224

February 19, 1976, to the NRC (hereafter referred to as the NRC decision) in which we considered the legality of providing similar types of assistance to participants and intervenors in NCR rulemaking and licensing proceedings.

Due to the time constraints established by the terms of your request, we have not solicited comments and views of the agencies concerned on the questions your letter poses. However, we have examined, with respect to each agency, some of the statutory and/or regulatory authorities which authorize or direct that public hearings be held for a variety of purposes related to accomplishment of the agency mission. We find that each agency has authority to request participation by members of the general public in its proceedings, either as parties or intervenors,

although there are individual differences in the extent to which such participation would be likely to be required.

Finally, we could discover no statutory prohibition against the provision of any of the types of assistance about which you have inquired.

We thus conclude that there is no significant difference in the relevant authorities for the nine agencies you named and in those of the NRC. Accordingly, the rationale of our February 19 decision to NRC is equally applicable to each agency named.

1. Provision of funds directly to participants. With respect to your first question, appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that (1) it cannot make the required

determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation. It should be noted that the Federal Trade Commission (FTC) has specific statutory authority, provided by section 202(a) of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183, approved January 4, 1975, to provide compensation for expenses of participation for persons appearing before it. This provision is discussed on pages 4 and 5 of our aforementioned decision.

We would like to emphasize, however, that it is within the discretion of each individual agency to determine whether the

participation of the particular party involved is necessary in order for it to properly carry out its functions and whether the party is indigent or otherwise unable to finance its participation. No party has a right to intervene at Federal expense unless the agency so determines.

Finally, for the reasons set forth in the NRC decision, we believe it would be advisable for the parameters of such financial assistance, and the scope and limitations on the use of appropriated funds for this purpose to be fully set forth by the Congress in legislation, as was done in the case of the Federal Trade Commission by the provisions of section 202(a) of the "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act," supra.

2. Modification of procedural rules so

as to ease their financial burdens on public participants. For the reasons stated with respect to NRC in the NRC decision, we find nothing in the laws of any of the agencies considered to prevent simplification of procedures and the elimination of unduly burdensome requirements which increase the cost of participation by parties involved.

3. Provision of technical assistance by agency staff. For the same reasons given under "Access to Technical Information and Staff" in the NRC decision with respect to NRC, the same access to technical expertise may be made available by each agency. As we stated with respect to NRC, this would not extend to the assignment of agency staff members to participants in the role of individual technical advisors for the purpose of advancing the position of a particular party.

4. Provision of legal assistance by agency staff. To the extent a participant needs factual information concerning legal aspects of a proceeding, such as explanations of procedures or examples of documents required to be filed, we believe agency staff members can provide this. However, agency staff could not be permitted to act in the capacity of advocates for a participant.

5. Creation of an independent public counsel. We believe nothing precludes an agency from having its staff present information to the agency's decisionmaking bodies concerning the public interest or consumer viewpoints in the course of a proceeding in order to call attention to relevant opinions not expressed by parties representing private interests. However, no agency could use its appropriations to establish an

independent entity outside its jurisdiction and control.

6. Creation of a Consumer Assistance Office such as that now employed by the FCC. On March 19, 1976, the Federal Communications Commission (FCC) announced the formation of a new Consumer Assistance office. According to a press release from FCC:

"This office will provide a central location or coordinating point within the Commission for members of the public, citizens groups and FCC licensees who seek information or assistance.

* * * * *

"The Consumer Assistance Office represents another step in the FCC's efforts to ensure prompt and accurate response to inquiries and to enhance

public understanding of the Commission's policies and regulations.

* * * * *

"Any person or group wishing information about the Commission's rules, matters pending or material explaining FCC policies and regulations may contact one of the full-time staff members of the Office.

"The Office also will provide information assistance to persons who wish to participate in the Commission's processes or file an application with the FCC but who are unfamiliar with the procedures to be followed.

"Finally, the Office will help prepare attractive and easy to understand brochures explaining Commission regulations and how best to comply with

them."

We have been informally advised by staff of the FCC that this office is not in any way intended to act as an advocate for consumers. It does not include in its staff attorneys or professional experts in other fields. Its function is, basically, that of providing the public with factual information. We are not aware of anything which would preclude any of the agencies named in your letter from establishing a similar office.

We might also point out that our NRC decision would also be applicable to agencies other than the ones mentioned in your letter, assuming that there was no specific legislative prohibition against it, provided that the particular agency holds hearings at which it has the discretion as to whom to admit as participants or intervenors; has

B-180224

appropriations available to pay for "necessary expenses" to carry out the missions for which the hearings are being held; and makes the determinations mentioned in the immediately preceeding paragraph. This is also true of the other types of assistance mentioned herein.

Sincerely yours,

R. F. KELLER

[Deputy] Comptroller General
of the United States

APPENDIX I

[Seal] 685

DIGEST - NO CIRCULATION

Comptroller General of the United States
Washington, D.C. 20548

B-139703

SEP 22 1976

The Honorable William Clay
House of Representatives

Dear Mr. Clay:

This is in response to a letter dated August 16, 1976, from you and six other members of the Congressional Black Caucus, asking five specific questions about the authority of the Federal Communications Commission (FCC) to reimburse expenses of persons who participate in proceedings before the Commission. The questions are as follows:

"1. Does the F.C.C. have the authority to make payments to persons who, as determined by the F.C.C., represent an interest the presentation of which contributes or can reasonably

be expected to contribute substantially to a fair determination of an F.C.C. proceeding, taking into account the number and complexity of the issues presented, the importance of public participation, and the need for representation of a fair balance of interest?

"2. Does the F.C.C. have the authority to make payments to persons who are not formally parties to F.C.C. proceedings but who nonetheless may submit written and/or oral comments and testimony pursuant to F.C.C. regulation, statute or court order?

"3. Does the F.C.C. have the authority to reimburse all the expenses reasonably necessary for a person to participate in an F.C.C. proceeding,

including attorneys' fees, witness fees, related travel and preparation expenses (e.g., phone calls, copy costs, support staff costs) and the expenses incurred in taking depositions?

"4. May payments be based on the prevailing market rate in the private sector for similar services and expenses?

"5. Does the Commission have the authority to make disbursements prior to the commencement of and/or during a proceeding?

As the letter indicates, our Office has confirmed in certain circumstances the authority of Federal regulatory agencies to reimburse the costs of persons who participate in proceedings before them. In

a decision to the Chairman of the Federal Trade Commission dated July 24, 1972, B-139703, we held that the Commission could pay attorney transcript, witness, and attendance expenses incurred by indigent respondents or intervenors upon determination that such payments were necessary for the proper disposition of matters before it. Similarly, in B-92288, February 19, 1976, we sustained the authority of the Nuclear Regulatory Commission to pay costs of indigent intervenor groups before it. Finally, in a letter to the Chairman of the Oversight and Investigations Subcommittee, House Committee on Interstate and Foreign Commerce, B-180224, May 10, 1976, we observed with respect to a number of regulatory agencies, including the FCC, that—

"***appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that [1] it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation.***"

The basic rationale underlying these decisions was stated as follows in B-92288, supra:

"*** While 31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held that where an appropriation

is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 6 Comp. Gen. 621 (1927); 17 id. 636 (1938); 29 id. 421 (1950); 44 id. 312 (1964); 50 id. 534 (1971); 53 id. 351 (1973).

"The question, of course, is whether it is necessary to pay the expenses of indigent intervenors in order to carry out NRC's statutory functions in making licensing determinations. We believe

only the administering agency can make that determination. We note that NRC's regulatory authorities are extremely broad.***

"In view of the above, if NRC in the exercise of its administrative discretion, determines that it cannot make the required determinations unless it extends financial assistance to certain interested parties who require it, and whose participation is essential to dispose of the matter before it, we would not object to use of its appropriated funds for this purpose.***"

However, we also suggested that it would be advisable for the scope and limitations of such authority to be specified by statute, as has been done in the case of the Federal

B-139703

Trade Commission under section 18(h) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 57a(h)(Supp. V, 1975). We note that legislation is now pending before the Congress which would expressly provide and delimit such authority with respect to Federal agencies generally. See H.R. 13901, 94th Cong. (May 19, 1976); S. 2715, 94th Cong. (May 13, 1976), as reported by the Senate Judiciary Committee, S. Rep. No. 94-863 (1976).

Applying the foregoing to the specific questions raised, we would advise, in response to the first question, that FCC appropriations are available to make payments to persons (and organizations) representing an interest in a matter before it where the Commission determines that such payments are necessary to achieve a fair resolution of the matter.

This conclusion follows from our prior decisions, discussed supra, and is also supported by the legislative history of the act—Pub. L. No. 94-362 (July 14, 1976), 90 Stat. 937, 956—making appropriations to the Commission for fiscal year 1977. See Cong. Rec., June 18, 1976 (daily ed.), H6210 (colloquy between Representatives Burke and Slack).

As indicated in our decisions, the prerequisite to such payments is a determination by the agency that the payments are "necessary" to the accomplishment of its functions. Certainly this would include obtaining presentations or other forms of participation which enable the full and fair resolution of matters before the Commission. However, we would emphasize that our decisions are limited

to situations in which the payment, as well as the participation, is necessary; that is, lack of financial resources on the part of the person involved would preclude participation without reimbursement. Accordingly, the Commission must determine that both the participation itself and payment therefor are necessary. In the absence of relevant statutory standards, we believe that the Commission must be accorded considerable discretion in making these determinations. Compare H.R. 13901 (page 3, line 15-page 4, line 12), and S. 2715 (page 9, line 7-page 10, line 3), supra, with respect to proposed statutory standards in this regard.

The second, third, and fourth questions each involve matters which we consider to be within the Commission's discretion, subject to the conditions discussed above. As

to the second question, prior to participation by a non-party the Commission must determine that participation by such non-party is necessary in order to enable the Commission to properly dispose of the matter before it, and that financial assistance is necessary in order to enable the non-party to participate. There may well be a situation in which the Commission would determine that participation by, and payments to, non-parties meet this test. Similarly with reference to questions three and four, the Commission would have the discretion to determine that payment--at such rates as FCC may determine reasonable under the circumstances--of any of the expenses listed are necessary for this purpose. Of course, the Commission may impose such limitations as it

sees fit and in any event could not pay more than is reasonable and necessary in order to obtain the required participation.

With reference to the fifth question, 31 U.S.C. § 529 (1970) prohibits the making of advances of public money in any case unless authorized by the appropriation concerned or other law. Since we are not aware of any such authorization on the part of the Commission which would apply here, we must conclude that payments for the participation here involved must be made on a reimbursement basis. Thus the Commission could make disbursements only as participation is actually accomplished. Of course, such participation might be accomplished prior to the close of a Commission proceeding. While the inability to make advance payments might

in some cases impede or prevent the Commission from obtaining desired participation, 31 U.S.C. § 529 clearly requires statutory authority for advance payments in this context. We note that such authority would be specifically provided by H.R. 13901 (page 5, lines 13-18) and S. 2715 (page 11, lines 4-9), supra.

We trust that the foregoing is responsive to the questions raised.

Sincerely yours,

R.F.KELLER

[Deputy]Comptroller General
of the United
States

APPENDIX J

DECISION [SEAL]

THE COMPTROLLER GENERAL
OF THE UNITED STATES
Washington, D.C. 20548

FILE: B-139703 DATE: DEC 3 1976

MATTER OF: Costs of Intervention - Food and Drug Administration

DIGEST: 1. Food and Drug Administration may reimburse costs of otherwise eligible persons or groups who participate in its proceedings where agency determines that such participation "can reasonably be expected to contribute substantially to a fair determination of" issues before it. Participation need not be "essential" in the sense that issues cannot be decided without such participation. B-92288, February 19, 1976, clarified.

PUBLISHED DECISION
56 Comp. Gen. .....

2. Food and Drug Administration may reimburse costs of persons or groups who participate in proceedings before it only where person or group lacks financial resources to participate adequately. Absent specific statutory authority, agency may not adopt more liberal standard of eligibility based on factors other than person's or group's actual financial resources which could be applied to participation in agency proceeding.

3. Food and Drug Administration may not make advance payments for costs of otherwise eligible persons or groups for partici-

pation in proceedings before it, absent specific statutory authority which overcomes prohibition against advance payments in 31 U.S.C. § 529.

4. Food and Drug Administration's authority to reimburse costs of otherwise eligible persons or groups who participate in proceedings before it extends to all types of agency proceedings.

The Acting Commissioner of the Food and Drug Administration (FDA) has requested our decision on certain questions raised by a petition filed by Consumers Union which has been published as an Advance Notice of Proposed Rulemaking in 41 Fed. Reg. 35855 (August 25, 1976).

In general terms the questions presented

to us involve the extent of FDA's legal authority to provide financial assistance, in the form of attorneys fees and other expenses of administrative litigation to certain participants in its adjudicatory and rule-making proceedings. Specific questions are raised concerning the criteria to be applied in determining eligibility for financing the expenses of participants under the terms proposed by Consumers Union in the light of prior statements by this Office on the subject in B-139703, July 24, 1972; B-92288, February 19, 1976; and a letter to the Chairman of the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce, B-180224, May 10, 1976. See also, our opinion to several members of the Congressional Black Caucus in B-139703, September 22, 1976.

B-139703

Our decisions in this area, referred to above, address the extent to which payments to parties and other participants in agency proceedings may be considered "necessary expenses" within the discretion accorded the Federal agency in carrying out its statutory functions. Thus we observed in B-92288, supra, with respect to the Nuclear Regulatory Commission (NRC):

"While 31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held that where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to

expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 6 Comp. Gen. 621 (1927); 17 id., 636 (1938); 29 id. 421 (1950); 44 id. 312 (1964); 50 id. 534 (1971); 53 id. 351 (1973).

"The question, of course, is whether it is necessary to pay the expenses of indigent intervenors in order to carry out NRC's statutory functions in making licensing determinations. We believe only the administering agency can make that determination.

* * * * *

"In view of the above, if NRC in the exercise of its administrative discretion, determines that it cannot make the required determination unless it

B-139703

extends financial assistance to certain interested parties who require it, and whose participation is essential to dispose of the matter before it, we would not object to use of its appropriated funds for this purpose. * * *"

The basic criteria to be applied were stated in B-180224, supra, as follows:

"* * * appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that (1) it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation. * * *"

> "We would like to emphasize, however, that it is within the discretion of each individual agency to determine whether the participation of the particular party involved is necessary in order for it to properly carry out its functions and whether the party is indigent or otherwise unable to finance its participation. No party has a right to intervene at Federal expense unless the agency so determines."

Our opinion in B-139703, September 22, 1976, concerning the Federal Communications Commission (FCC), elaborated upon these criteria:

> "* * * FCC appropriations are available to make payments to persons (and organizations) representing an interest in a matter before it where the Commission determines that such payments

are necessary to achieve a fair resolution of the matter. This conclusion follows from our prior decisions, discussed supra * * *.

"As indicated in our decisions, the prerequisite to such payments is a determination by the agency that the payments are 'necessary' to the accomplishment of its functions. Certainly this would include obtaining presentations or other forms of participation which enable the full and fair resolution of matters before the Commission. However, we would emphasize that our decisions are limited to situations in which the payment, as well as the participation, is necessary; that is, lack of financial resources on the part of the person involved would preclude participation without reim-

bursement. Accordingly, the Commission must determine that both the participation itself and payment therefor are necessary. In the absence of relevant statutory standards, we believe that the Commission must be accorded considerable discretion in making these determinations. Compare H.R. 13901 [94th Congress] (page 3, line 15-page 4, line 12), and S. 2715 [94th Congress](page 9, line 7-page 10, line 3), supra, with respect to proposed statutory standards in this regard."

The Consumers Union petition advocates the adoption of standards which would define eligibility for receipt of compensation for costs of participants as follows:

"(a)(1) The Commissioner may provide compensation for reasonable

attorneys' fees, expert witness fees, and other reasonable costs of participation incurred by eligible participants in any rule making or adjudicatory proceeding conducted pursuant to Subparts B,C,D, and E of these regulations, whenever public participation in such a proceeding promotes or can reasonably be expected to promote a full and fair determination of the issues involved in the proceeding.

"(2) Any person is eligible to receive an award under this section * * * for * * * participation (whether or not as a party) in a rule making or adjudicatory proceeding if

"(i) The person represents an interest the representation of which contributes or can reasonably be expected to contribute substantially to a fair

determination of the proceeding, taking into account the number and complexity of the issues presented, the importance of public participation, and the need for representation of a fair balance of interests; and

"(ii)(a) The economic interest of the person in the outcome of the proceeding is small in comparison to the costs of effective participation in the proceeding by that person or in the case of a group or organization, the economic interest of the individual members of such group or organization is small in comparison to the costs of effective participation in the proceedings; or

"(b) The person demonstrates to the satisfaction of the Commissioner that such person does not have sufficient resources available to adequately parti-

cipate in the proceeding in the absence of an award under this section."

(Emphasis added.)

FDA's specific questions concerning the proposal, and our responses, are as follows:

1. "Your decision concerning the Nuclear Regulatory Commission indicates that payments can be made if the agency determines that participation is 'essential' to dispose of the matter. We request your views on whether FDA may pay the costs of participants if FDA finds that the participation would be useful in disposing of a matter but cannot conscientiously find that the participation is 'essential.'"

While our decision to NRC did refer to participation being "essential," we did not

intend to imply that participation must be absolutely indispensable. We would agree with Consumers Union that it would be sufficient if an agency determines that a particular expenditure for participation "can reasonably be expected to contribute substantially to a full and fair determination of" the issues before it, even though the expenditure may not be "essential" in the sense that the issues cannot be decided at all without such participation. Our previous decisions may be considered modified to this extent.

2. "Under the Consumers Union petition, assistance could be provided when public participation can 'reasonably be expected to promote a full and fair determination of the issues' and when the participant 'represents

an interest the representation of which * * * can reasonably be expected to contribute substantially to fair determination * * * '

This standard seems to give special weight, in assistance determinations, to the role of the participant in representing consumers and other interests potentially affected by FDA decisions. We would appreciate your views on whether FDA may make awards solely to ensure that a potentially affected interest is represented, or may give the representational role of the participant special weight in deciding whether to provide financial assistance."

As noted in our answer to question 1, we perceive no legal objection to the proposed

standard. Of course, it is the agency that must determine whether the standard has been met in particular cases, and the agency has considerable discretion in this regard.

With respect to the second part of the question, the agency also has discretion in determining the value of a participant's representational role. We do not read the standard as requiring participation of all those representing consumers or other parties affected by FDA determinations unless the FDA also finds that such participation will substantially contribute to the full and fair disposition of the particular matters before it.

3. "Under the financial eligibility criteria in the petition, payment could be made to persons or organizations who have (or have members

with) an economic interest in the outcome which is small in comparison with the costs of effective participation or who demonstrate they do not have sufficient resources to participate adequately. In a May 10, 1976 letter to Congressman Moss, your office indicated that payments may be made to a party who is 'indigent or otherwise unable to finance its participation.' We would like your views on whether payments under the financial criterion in the Consumers Union petition would be authorized."

As stated in our opinion in B-139703, September 22, 1976, supra:

"* * * our decisions are limited to situations in which the payment, as well as the participation, is necessary; that

> is, lack of financial resources on the part of the person involved would preclude participation without reimbursement. Accordingly, the * * * [agency] must determine that both the participation itself and payment therefor are necessary. * * *"

We are still of the view set forth in our prior opinions that a regulatory agency may not pay costs of a party requesting to participate in a regulatory agency proceeding unless the agency first determines that the party is indigent or otherwise unable to finance its participation. Accordingly, it is our view that FDA may not extend financial assistance to a party requesting to participate which has the financial resources to participate but does not, for whatever reason, wish to use its resources for this purpose.

B-139703

Section 2.151(a)(2)(ii) of the proposed Consumers Union regulation would permit reimbursement for costs of participation either where lack of sufficient resources can be demonstrated or where:

> "* * * the economic interest of the person in the outcome of the proceeding is small in comparison to the costs of effective participation in the proceeding by that person or, in the case of a group or organization, the economic interest of the individual members of such group or organization is small in comparison to the costs of effective participation in the proceedings * * *."

Since the latter standard, as quoted, is based on factors other than financial ability to participate in a strict sense, we must

conclude that it is not acceptable under our prior decisions and in the absence of specific statutory authority.

Also, we note that the Consumers Union proposed regulation would permit advance payments in certain circumstances. However, unless FDA has specific statutory authority therefor, advance payments would be precluded by 31 U.S.C. § 529 (1970). See B-139703, September 22, 1976, supra, at page 4.

4. "* * * the Consumers Union petition asks that awards be available for hearings in connection with rule-making and adjudicatory proceedings, including public hearings before a public advisory committee pursuant to Subpart D of the proposed regulations on administrative practices and procedures published in the

B-139703

September 3, 1975 Federal Register (40 FR 40682). The NRC decision dealt only with costs of participation in an adjudicatory licensing hearing."

We see no basis for distinction in terms of the nature of agency proceedings for the purposes here relevant.

5. "Like the Nuclear Regulatory Commission, the Food and Drug Administration generally receives a lump sum appropriation for salaries and expenses. The Agency does not have any express statutory authority to use its appropriated funds specifically to assist participants.

"Any expenditure made by FDA to provide assistance to participants will also come within the scrutiny

of the Congressional subcommittees responsible for our appropriations, i.e., the Subcommittees for Agriculture and Related Agencies of the House and Senate Appropriation Committees. We would appreciate your comments on whether we need to obtain the views of these subcommittees on this issue, or whether these subcommittees have expressed agreement with your position on this matter."

Our opinions in this area are concerned only with the availability of appropriations as a matter of law. Strictly speaking, notice to, or approval by, the appropriations subcommittees is not required for the use of appropriations sanctioned by our opinions, assuming that there are no applicable statutory requirements for prior congressional approval.

B-139703

Thus the question raised here is one of policy and the relationships between the agency and the subcommittees which we cannot resolve. Our Office does, of course, favor the greatest possible disclosure of spending activities to interested congressional committees and subcommittees.

In response to the final question, we are not aware that the subcommittees referred to have expressed any views on our opinions in this area.

R.F. KELLER

Deputy Comptroller General
of the United States

APPENDIX K

Section 2 of the Federal Power Act (16 U.S.C. § 793) provides, in pertinent part:

"The commission may make such expenditures . . . as are necessary to execute its functions. . . ."

Section 308 of the Federal Power Act (16 U.S.C. § 825g) provides, in pertinent part:

"(a) Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding,

or any other person whose participation in the proceeding may be in the public interest."

Title IV of the Public Works for Water and Power Development and Energy Research Appropriation Act, 1977 (Pub. L. No. 94-355, 90 Stat. 889, 898) provides, in pertinent part:

"Federal Power Commission

Salaries and Expenses

For expenses necessary for the work of the Commission, as authorized by law, . . . $41,582,000."

Supreme Court, U. S.
FILED
JAN 12 1978
MICHAEL RODAK, JR., CLERK

No. 77-481

In the Supreme Court of the United States

OCTOBER TERM, 1977

GREENE COUNTY PLANNING BOARD, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ROBERT R. NORDHAUS,
General Counsel,
Federal Energy Regulatory Commission,
Washington, D.C. 20426.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Discussion	8
Conclusion	19
Appendix	1a

CITATIONS

Cases:

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240	15, 16, 17
Automobile Club of Michigan v. *Commissioner of Internal Revenue*, 353 U.S. 180	18
Chisholm v. *Federal Communications Commission*, 538 F. 2d 349, certiorari denied, 429 U.S. 890	18
Fitzgerald v. *United States Civil Service Commission*, 554 F. 2d 1186	10
Greater Boston Television Corp. v. *Federal Communications Commission*, 444 F. 2d 841, certiorari denied, 403 U.S. 923	18
Mesa Petroleum Co. v. *Federal Power Commission*, 441 F. 2d 182	13
Metropolitan Edison Co. v. *Federal Power Commission*, 169 F. 2d 719	13

Page

Cases—continued:

Niagara Mohawk Power Corp. v. *Federal Power Commission*, 379 F. 2d 153 13

Permian Basin Area Rate Cases, 390 U.S. 747 13

Public Service Commission of State of New York v. *Federal Power Commission*, 327 F. 2d 893 13

Royal Indeminity Co. v. *United States*, 313 U.S. 289 13

Turner v. *Federal Communications Commission*, 514 F. 2d 1354 15

Statutes:

Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 ..... 1, 8

Section 401(c) 12

Section 402(a)(1)(A) 16

Section 402(a)(2) 9, 12

Section 705 1

Energy Reorganization Act of 1974, 88 Stat. 1233 14

Energy Supply and Environmental Coordination Act of 1974, Section 7(d), 88 Stat. 260, 15 U.S.C. (Supp. V) 793(d) 5

Page

Statutes—continued:

Federal Power Act, 41 Stat. 1063, as amended, 16 U.S.C. 791a *et seq.* 9, 12

Section 2, 16 U.S.C. 793 2

Section 4(e), 16 U.S.C. 797(e) 12

Section 10(e), 16 U.S.C. 803(e) 15, 16

Section 308, 16 U.S.C. 825g 2

Section 308(a), 16 U.S.C. 825g(a) 12

Section 309, 16 U.S.C. 825h 2, 4, 12, 1a

Section 314(c), 16 U.S.C. 825m(c) 2, 12, 14, 1a-2a

Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.* 9

15 U.S.C. 717s(c) 13

15 U.S.C. (Supp. V) 57a(h)(1) 14

Miscellaneous:

Executive Order No. 10485 (3 C.F.R. 970 (1949-1953 Comp.)) 5

Executive Order No. 12009, 42 Fed. Reg. 46267 1

H.R. Conf. Rep. No. 93-1445, 93 Cong., 2d Sess. (1974) 14

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-481

GREENE COUNTY PLANNING BOARD, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

The Solicitor General submits this response on behalf of the Federal Energy Regulatory Commission.[1]

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[1]On September 30, 1977, pursuant to the Department of Energy Organization Act (DOE Act), Pub. L. 95-91, 91 Stat. 565, and Executive Order No. 12009, 42 Fed. Reg. 46267, the Federal Power Commission ceased to exist. Most of its functions and regulatory responsibilities were transferred to the Federal Energy Regulatory Commission, which, as an independent commission within the Department of Energy, was activated on October 1, 1977. The "savings provisions" of Section 705 of the DOE Act, 91 Stat. 606, provide for the substitution of the Federal Energy Regulatory Commission for the Federal Power Commission in pending litigation such as this case.

OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. A) is reported at 559 F. 2d 1237. The opinion of a panel of the court of appeals (Pet. App. C) is reported at 559 F. 2d 1227. The orders of the Federal Power Commission (Pet. Apps. E and F) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1977. The petition was filed on September 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission has statutory authority to provide compensation, under appropriate standards and procedures, for expert witness fees, attorneys' fees and other expenses of parties who intervene in its proceedings.

STATUTES INVOLVED

Section 2 of the Federal Power Act, 41 Stat. 1063, as amended, 16 U.S.C. 793, and Section 308 of that Act, as added, 49 Stat. 858, 16 U.S.C. 825g, are set forth in pertinent part at Pet. App. K, pp. 123a-124a. Sections 309 and 314(c) of the Federal Power Act, as added, 49 Stat. 858, 861, 16 U.S.C. 825h and 825m(c), are set forth in an Appendix, *infra*, pp. 1a-2a.

STATEMENT

In August 1968, the Power Authority of the State of New York (PASNY) applied for a license from the Federal Power Commission to construct and operate a pumped storage power project some 40 miles southwest of Albany, New York. The project included construction of

three transmission lines. The Commission granted a license for the project in June 1969, but the license expressly prohibited construction of the transmission lines without further Commission approval of "plans for preservation and enhancement of the environment as it may be affected by the transmission lines design and location." 41 F.P.C. 712, 718. No protests were filed with respect to two of the lines, and the Commission approved their construction without a hearing. However, petitioners and others protested the proposed routing of the third line, which was to run through the Durham Valley in Greene County, an area (situated on the northern edge of the Catskills) of scenic and historic value. In May 1970 petitioners were permitted to intervene in the licensing proceeding. In May 1971 the Commission ordered a hearing on PASNY's application. In June 1971 petitioners moved that PASNY, or the Commission, pay the expenses, including expert witness fees and attorneys' fees, incurred by them in the proceeding. Petitioners also moved that the Commission rescind the June 1969 license for the projects and stop further construction, on the grounds that the Commission was in violation of the Federal Power Act and the National Environmental Policy Act of 1969 (NEPA). In October 1971 the Commission denied petitioners' motions, 46 F.P.C. 1101, and a petition for review followed. *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412 (C.A. 2) ("*Greene County I*"), certiorari denied, 409 U.S. 849.

In *Greene County I* the court of appeals held that the Commission had violated NEPA by failing to prepare its own environmental impact statement and relying on PASNY's statement instead. On the question of expenses and fees, however, the court declined to order the Commission to reimburse petitioners. The court noted

that while the Commission's order denying such payments appeared to be based on the Commission's view "that it had no authority to grant them," the Commission had argued to the court "that it has foreclosed only the present award of fees and has left open the question of whether ultimately to award them when the proceedings have come to an end." 455 F. 2d at 425. The court concluded, "in agreement with the Commission's position," that "at this posture of the proceedings and under current circumstances, without a clearer congressional mandate we should not order the Commission or PASNY to pay the expenses and fees of petitioners, either as they are incurred or at the close of the proceedings." 455 F. 2d at 426.[2]

Following the court's remand, the Commission prepared an environmental impact statement on the transmission line and conducted a proceeding that included a lengthy hearing in which petitioners participated and presented expert witnesses.[3] In July 1974,

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[2]The court thus apparently held that *it* lacked statutory authority to *order* the Commission to award reimbursement, without reaching the question whether the Commission itself had discretionary authority to provide reimbursement in appropriate circumstances. Thus, the court added that "[w]ithout a showing of compelling need, it would be premature for us to inject the federal courts into this area of administrative discretion, perhaps foreclosing more flexible approaches through agency action or rules." 455 F. 2d at 427. However, in discussing Section 309, 16 U.S.C. 825h, one of the statutes relied on by petitioners, the court observed that "we perceive no basis in the terms of the provision to extend the Commission's power to include paying or awarding the expenses or fees of intervenors." *Id.* at 426.

[3]In the course of the proceeding petitioners again sought review in the court of appeals, challenging the adequacy of the impact statement; the court dismissed this challenge as premature. *Greene County Planning Board* v. *Federal Power Commission*, 490 F. 2d 256 (C.A. 2) ("*Greene County II*"). In addition, petitioner Greene County Planning Board sought review in 1975 of a Commission order granting PASNY a permit under Executive Order No. 10485 (3 C.F.R. 970 (1949-1953 Comp.)) and Section 7(d) of the Energy Supply and Environmental Coordination Act of 1974, 88 Stat. 260, 15 U.S.C. (Supp. V) 793(d), to construct a transmission facility on the Canadian border. The court dismissed this petition on the ground that it lacked jurisdiction to review such orders. *Greene County Planning Board* v. *Federal Power Commission*, 528 F. 2d 38 (C.A. 2) ("*Greene County III*").

the Commission's administrative law judge issued an opinion authorizing construction of the line but selecting a different route from that proposed by PASNY and the Commission's staff, a route that skirted the Durham Valley. In January 1976, the Commission affirmed this decision. With respect to petitioners' renewed motion for reimbursement of their fees and expenses, the Commission reaffirmed its earlier denial. It stated (Pet. App. E, pp. 39a-41a):

> The Court in *Greene County I* could see no Congressional mandate for requiring the payment of fees and expenses in Section 309 or 314(c) of the Federal Power Act or in Section 102(1) of NEPA cited by Greene County, but would not make a final determination of that point in view of the procedural disposition. * * *
>
> Upon considering this matter further we do not find that Intervenors here have made a case for an award of expenses and fees even if we had the authority to make such an award. The Intervenors represent local towns and land owners who could conceivably have been damaged by the Gilboa-Leeds line. They had every right to present their cases as have countless other intervenors in cases before the

> Commission, who intervene for the benefit of local areas either because they do not desire the building of a hydroelectric project or pipeline or because they want it and the energy supplies made available. These intervenors are protecting their own interests, and we see no reason to grant them fees and expenses. If they were generally allowed, a large financial burden would be imposed on this Commission and the taxpayer or upon the utility involved and inevitably on its ratepayers. In the absence of a mandate in the statute we are loath to attempt such an expensive departure from past practice.

In April 1976 the Commission denied petitions for rehearing, stating with respect to the reimbursement issue (Pet. App. F, p. 43a): "This matter is covered in [the decision just quoted] and further comment is not necessary."

On petition for review, a panel of the court of appeals affirmed the Commission's grant of PASNY's license for the transmission line but remanded the order with respect to the denial of reimbursement (Pet. App. C, pp. 19a-34a). The panel read the Commission's order as "holding that it lacked the authority to make such payments and that none of the intervenors deserved such compensation in any event since they had only been 'protecting their own interests' " (Pet. App. C, p. 27a). The panel then noted (*id.* at 27a-28a) that after the Commission's decision, the Comptroller General had issued opinions to the effect that the Nuclear Regulatory Commission and nine other federal agencies, including the Federal Power Commission, did have implied authority under their statutes to pay expenses and fees of intervening parties in certain circumstances (see Pet. Apps. G, H, I, J, pp. 44a-122a). Since "the Comptroller General is Congress's agent

for the purpose of determining the legality of administrative expenditures, *see* 31 U.S.C. §65(d)," and since his opinion here was "not clearly incorrect," the panel concluded that "the FPC now appears to have authorization to pay intervenors' expenses" (Pet. App. C, pp. 28a-29a). The panel accordingly remanded the case to the Commission for reconsideration of its holding and a determination whether compensation of petitioners was appropriate (Pet. App. C, p. 30a).

Judge Van Graafeiland dissented. He challenged the weight given by the majority to the Comptroller General's view of the Commission's authority "in the face of the Commission's own determination that it has no such power and this Court's finding in support thereof" (Pet. App. C, p. 31a). He further stated that "[w]e * * * needlessly inject the Federal Courts into an area of administrative discretion when we compel the Federal Power Commission to conform its practices to what the Comptroller General opines are proper" (*id.* at 33a), and he concluded that "[w]e should not require the Commission to reconsider its discretionary determination merely because we have some doubts about its fairness" (*id.* at 34a).

The Commission petitioned for rehearing. It argued, among other things, that its interpretation of its own statutory authority was "entitled to great deference by the courts," and that "[t]he reviewing court should not substitute its judgment for that of the Commission, if the Commission's interpretation is reasonable" (FPC Br. on Rehearing *En Banc*, p. 15). The Commission said that the panel should not have rejected "the Commission's interpretation of its statutory authority" simply because the Comptroller General's opinion was " 'not clearly incorrect' " (*ibid.*).

The court of appeals *en banc*, in a five-to-three decision, reversed the panel and upheld the Commission's order (*"Greene County IV"*). The majority, in an opinion by Judge Van Graafeiland, held that "the Federal Power Commission has no statutory authority to make the disbursements in question" (Pet. App. A, p. 5a). It noted that the Commission "has never deemed itself authorized" to make such payments, and that "[t]his interpretation of the Federal Power Act by the agency charged with its administration is entitled to great deference from this Court" (*id.* at 4a-5a, n. 2). The court concluded that "[i]n light of the Supreme Court's very broad language in *Alyeska Pipeline Service Co.* v. *Wilderness Society* [,421 U.S. 240, 257,] that 'absent statute or enforceable contract, litigants pay their own attorneys' fees,' a finding that the Federal Power Commission is empowered to reimburse intervenors for their legal expenses must await appropriate Congressional action" (Pet. App. A, p. 6a).

DISCUSSION

The court below appears to have held that the Federal Power Commission, and hence its successor the Federal Energy Regulatory Commission, lacks statutory authority under any circumstances to expend its funds to defray the expert witness fees, attorneys' fees or other expenses of intervenors in its proceedings. This holding accords with the view that was taken and urged on the court of appeals by the Federal Power Commission. The Federal Energy Regulatory Commission, however, has concluded that the holding is erroneous. This Commission believes that it does have authority under the Federal Power Act, and the Department of Energy Organzation Act,[4] to

[4]The Department of Energy Organization Act (DOE Act), Pub. L. 95-91, 91 Stat. 565, abolished the Federal Power Commission and, as of October 1, 1977, created the Federal Energy Regulatory Commission (see note 1, *supra*). The Act transfers to the Federal Energy Regulatory Commission most of the functions and powers that were exercised by the Federal Power Commission under both the Federal Power Act, 16 U.S.C. 791a *et seq.*, and the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq*. The Act provides that "[t]he Commission may exercise any power under [certain enumerated sections of the Federal Power Act and the Natural Gas Act] to the extent the Commission determines such power to be necessary to the exercise of any function within the jurisdiction of the Commission" (Section 402(a)(2), 91 Stat. 584).

compensate intervenors in its proceedings for their expenses, including attorneys' fees, in appropriate circumstances. This Commission has also concluded, contrary to the view that was apparently taken by the Federal Power Commission (Pet. App. E, p. 41a), that the fact that petitioners were "protecting their own interests" would not compel the conclusion that they should be denied such compensation. Under what circumstances compensation by the Commission would be appropriate, what procedures should be adopted, and whether and how much these petitioners should be compensated, are all questions that the Commission has not decided. The Commission wishes to consider and decide these questions, and will do so if allowed to.[5]

The decision of the court of appeals concerning the authority of the Federal Power Commission was based, at least in part, on the position taken by that Commission

[5]Many other agencies and departments of the federal government have concluded, in accord with the opinions of the Comptroller General, that their authorizing statutes permit them, under appropriate standards and procedures, to defray attorneys' fees and other expenses of intervenors in their proceedings. Having found that intervenors frequently make significant contributions to the development of relevant information and the resolution of public policy issues, many agencies and departments have established standards and procedures for providing such compensation, and others are preparing to do so.

concerning its own authority. While the different view now taken by the Federal Energy Regulatory Commission cannot conclude the legal issue, it should be entitled to as much weight as the view of the former Commission. There is no reason to doubt that the court of appeals would give it appropriate weight, and there is reason to believe that it might affect the court's decision. We therefore suggest that the most appropriate disposition of this case at this juncture would be for the Court to grant the petition for certiorari, vacate the judgment of the court of appeals, and remand the case to that court for reconsideration in the light of the changed circumstances.

1. Broad as the holding of the court of appeals appears to be, it is important to note several issues that are not presented here.

First, neither the petition nor the decision below presents the question whether the Commission is *required* to reimburse petitioners or any other intervenors for any expenses.[6] In *Greene County I* the court held that it had no authority to require the Commission to reimburse petitioners, and we do not understand petitioners to question the correctness of that holding. Cf. *Fitzgerald* v. *United States Civil Service Commission*, 554 F. 2d 1186 (C.A. D.C.), where the court rejected the plaintiff's claim that he was entitled to attorneys' fees as part of his damages for having been wrongfully discharged.

[6]As the Comptroller General said in responding to the inquiry of the Nuclear Regulatory Commission presenting the same issue that is involved here, "[t]here is also no question of *compelling* NRC to pay the expenses of any of the parties" (Pet. App. G, pp. 64a-65a; emphasis in original).

Second, the petition raises no question concerning the scope of the Commission's discretion in granting or denying compensation for attorneys' fees or other expenses, the proper circumstances or conditions for such compensation, whether these petitioners should be awarded any compensation, or, if so, how much they should be awarded. Those are questions for the Commission to decide in the first instance, if it is allowed to do so.[7]

Third, the issue here involves only the Commission's authority to defray expenses and attorneys' fees with respect to participation in proceedings before the Commission. It involves no question concerning the Commission's authority or obligation to defray expenses or fees with respect to collateral proceedings, such as petitions for judicial review.[8] We contend only that the Commission has statutory authority to provide financial aid for the purpose of assisting its own decision-making functions, not the decision-making functions of other bodies.

2. We submit that, as the Comptroller General has concluded, the statutory powers of the Federal Power Commission, and now the Federal Energy Regulatory Commission, are broad enough to permit the Commission to disburse funds to intervenors for the payment of attorneys' fees and other expenses when the Commission

[7]In contending that the Commission has statutory authority to provide compensation for attorneys' fees and other expenses, we express no view on any of these questions.

[8]As the history of this case reflects, petitioners have expended substantial time and effort in judicial proceedings in which the Federal Power Commission was a party. See note 3, *supra*.

decides, under appropriate standards and procedures, that such disbursement would assist it in carrying out its statutory functions.

The Federal Power Act, 16 U.S.C. 791a *et seq.*, imposes a wide range of regulatory responsibilities on the Commission, including the issuance of licenses to construct and operate electric transmission lines such as the one involved in this case (Section 4(e), 16 U.S.C. 797(e)).[9] Under the Power Act and the DOE Act, the Commission is given broad powers to carry out these responsibilities. The DOE Act, while it places the Commission within the Department of Energy for budgetary purposes, declares generally (Section 401(c), 91 Stat. 582) that "[t]he Secretary shall provide to the Commission such support and facilities as the Commission determines it needs to carry out it functions." Section 309 of the Power Act, 16 U.S.C. 825h, empowers the Commission "to perform any and all acts * * * as it may find necessary or appropriate to carry out the provisions of this chapter." Section 308(a) of the Power Act, 16 U.S.C. 825g(a), authorizes the Commission to hold hearings and, "in accordance with such rules and regulations as it may prescribe, * * * [to] admit as a party * * * any representative of interested consumers * * * or any other person whose participation in the proceeding may be in the public interest." And Section 314(c) of the Act, 16 U.S.C. 825m(c), provides:

> The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it * * *.[10]

The courts have frequently recognized that the Commission's powers must be broadly construed, and that they include not only powers explicitly conferred but also such implied powers as are necessary and proper for the discharge of the Commission's statutory functions. See, *e.g.*, *Mesa Petroleum Co.* v. *Federal Power Commission*, 441 F. 2d 182, 187 (C.A. 5); *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, 379 F. 2d 153, 158 (C.A. D.C.); *Public Service Commission of State of New York* v. *Federal Power Commission*, 327 F. 2d 893, 896-897 (C.A. D.C.); *Metropolitan Edison Co.* v. *Federal Power Commission*, 169 F. 2d 719, 723 (C.A. 3). As this Court said in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 776, "[s]urely the Commission's broad responsibilities * * * demand a generous construction of its statutory authority."

There is no reason to depart from these principles when considering the Commission's authority to defray attorneys' fees and other expenses of intervenors in its proceedings.[11] The power to provide such compensation to persons who contribute to the effective performance of the Commission's functions is no different in kind from the power to employ technical or legal consultants for

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[9]This section of the Federal Power Act, along with all the others cited in this paragraph of the text, is among the sections expressly carried over to the Federal Energy Regulatory Commission by Section 402(a)(2) of the DOE Act, 91 Stat. 584, quoted in note 4, *supra*.

[10]The same provision appears in the Commission's other major authorizing statute, the Natural Gas Act, 15 U.S.C. 717s(c).

[11]*Royal Indemnity Co.* v. *United States*, 313 U.S. 289, cited by the court below (Pet. App. A, p. 6a), is not to the contrary. Indeed *Royal Indemnity* expressly stated that federal officers are without power to disburse public funds "save only as [the power] has been conferred upon them by Act of Congress *or is to be implied from other powers so granted*" (emphasis supplied). 313 U.S. at 294.

particular projects or proceedings.[12] The court below erred in concluding that, in the absence of a statutory provision expressly authorizing expenditures for this purpose,[13] the Commission had no such power under any circumstances.

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[12]Indeed, with respect to compensation for the services of attorneys, Section 314(c) of the Federal Power Act (16 U.S.C. 825m(c)), quoted at page 13, *supra*, might be viewed to constitute an express statutory authorization. Especially pertinent is its empowerment of the Commission to employ attorneys "for proper representation of the public interests in * * * cases or proceedings pending before it * * *." This section was not discussed in the decision below. The court in *Greene County I* did refer to the section—but quoted only the authorization to employ attorneys "for proper legal aid and service of the Commission * * *," not the provision we have just quoted—and expressed the apparent view that the section refers only to the engagement of attorneys in an employer-employee relationship. 455 F. 2d at 426-427. The language does not compel such a narrow reading, and the principles applicable to construction of agency authorizations (see the cases cited at page 13, *supra*) would seem to reject it.

[13]One agency, the Federal Trade Commission, now has express authority to "provide compensation for reasonable attorneys fees, expert witness fees and other costs of participating in a rulemaking" to persons representing an interest that would not otherwise be adequately represented in the proceeding. 15 U.S.C. (Supp. V) 57a(h)(1), discussed in the opinion of the Comptroller General dated February 19, 1976 (Pet. App. G, pp. 54a-57a). The Comptroller General noted that that statute was intended to formalize the prior practice of the Trade Commission based on an earlier opinion of the Comptroller General, and was not intended to indicate a lack of authority on the part of agencies without such express authorization (Pet. App. G, pp. 56a-57a). See, *e.g.*, H.R. Conf. Rep. No. 93-1445, 93d Cong., 2d Sess. 37 (1974), which recommended against an amendment to the Energy Reorganization Act of 1974, 88 Stat. 1233, that would have provided the Nuclear Regulatory Commission with the same express authority, on the ground that "it appears that there is nothing in the Atomic Energy Act, as amended, which would preclude the Commission from reimbursing parties where it deems it necessary."

3. The court below and the Federal Power Commission erred in concluding that the issue in this case is governed by *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, or *Turner* v. *Federal Communications Commission*, 514 F. 2d 1354 (C.A. D.C.). The issue in those cases was fee shifting—that is, the asserted authority of a court or agency to compel a losing litigant to pay the attorneys' fees of the prevailing party. The decisions there were based on the long-established rule in this country against fee-shifting in the absence of a clear statutory mandate, and on the policy considerations underlying that rule. As the opinions of the Comptroller General recognize (see Pet. App. G, pp. 63a-65a), the issue in this case is different. The issue here is whether an agency has the statutory authority to disburse its own funds for the compensation of attorneys whose representation of parties before the agency advances the effective performance of the agency's functions, where in the absence of compensation the agency may not receive such assistance. This issue is controlled by the agency's authorizing statutes, and in the case of the Federal Energy Regulatory Commission we submit that the authority exists.

Intervenor PASNY argues in opposition to the petition (PASNY Br. in Opp., pp. 14-16) that reimbursement to intervenors would involve an element of fee shifting because Section 10(e) of the Federal Power Act, 16 U.S.C. 803(e), provides that licensees under Part I of the Act "shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs

of administration of this Part * * *."[14] This argument, which was not discussed in the decision below, is incorrect.

First, Section 10(e) does not by its terms require licensees to bear the entire costs of administration, and annual charges in fact do not cover the full costs of administration. Moreover, Section 10(e) provides that the amounts of annual charges are "to be fixed by the Commission." Section 10(e) would not, in our view, require the Commission to include amounts disbursed to intervenors in the costs recouped through the annual charges.

Second, even if such disbursements were included as costs of administration under Section 10(e) and thus borne by all the Commission's licensees, this result would not constitute fee-shifting as commonly understood. It would lack, for one thing, the element of imposing the winning party's fees substantially, directly, and exclusively on the losing party in the same case, which characterizes the judicial fee shifting that was rejected in *Alyeska* and which figures prominently in the policy arguments favoring such rejection.

In any event, since the Commission has not determined how much compensation, if any, would be appropriate, and since aggregate disbursements when apportioned among all licensees might be *de minimis*, any contention

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[14]The Federal Power Commission made the same argument in its brief on rehearing in the court below (FPC Br. on Rehearing *En Banc*, pp. 9-11). The fixing of annual charges to be paid by licensees under Section 10(e) of the Federal Power Act is a function of the Federal Power Commission that has been carried over to the Federal Energy Regulatory Commission by virtue of Section 402(a)(1)(A) of the DOE Act, 91 Stat. 584).

that such disbursements would have the effect of fee shifting, in violation of the principles set forth in *Alyeska*, is premature.

4. We therefore believe that the court below erred in holding that the Commission lacks statutory authority to defray the expenses of intervenors in any circumstances. We suggest, however, that the appropriate disposition of this case at this juncture would be to grant the petition for certiorari, vacate the judgment of the court of appeals, and remand the case to that court for reconsideration of the issue in the light of the position taken by the Federal Energy Regulatory Commission. We suggest this disposition because there appears to be a reasonable possibility that the court of appeals would view the matter differently in the light of the view held by the new Commission, as opposed to that formerly held by the Federal Power Commission, and because we believe the court of appeals should be given the opportunity to consider the effect of the changed legal posture in which the case now stands.

The court of appeals was evidently influenced by the position of the Federal Power Commission. The majority opinion of the *en banc* court appeared to rely on the fact that the Federal Power Commission had "never deemed itself authorized" to award compensation for attorneys' fees, and on the principle that "[t]his interpretation of the Federal Power Act by the agency charged with its administration is entitled to great deference from this Court" (Pet. App. A, pp. 4a-5a, n. 2). Moreover, Judge Van Graafeiland, the author of the majority opinion, had dissented from the panel opinion on the ground, among others, that "[w]e * * * needlessly inject the Federal courts into an area of administrative discretion when we compel the Federal Power Commission to conform its practices to what the Comptroller General opines are proper" (Pet. App. C, p. 33a).

The same considerations of agency discretion may now lead a majority of the court of appeals to a different conclusion. The court may now conclude that since the Federal Energy Regulatory Commission—the agency now charged with the responsibility of interpreting and implementing the Federal Power Act and other statutes—believes it does have the authority to provide compensation for intervenors' expenses in appropriate circumstances and desires to exercise that authority,[15] the courts should defer to this view if it is not an unreasonable interpretation of the statutes in question.[16] We believe the court below should be given an opportunity to consider the issue in this new light, and, if it does reach a different conclusion, to remand the case to the Commission for a determination of what procedures

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[15]Although the Federal Power Commission appeared to deny petitioners' application for reimbursement partially on the ground that it would not have exercised its discretion to provide reimbursement even if it had that discretion, it is not clear that this constituted an alternative holding unaffected by the Commission's view of its lack of authority. See Pet. App. E, pp. 38a-41a. In any event, the Federal Energy Regulatory Commission does not share the Federal Power Commission's apparent view that discretionary reimbursement should be withheld whenever intervenors were "protecting their own interests" (*id.* at 41a), a view that would disqualify virtually all intervenors.

[16]It is well settled that "an agency's view of what is in the public interest may change, either with or without a change in circumstances" (*Greater Boston Television Corp.* v. *Federal Communications Commission*, 444 F. 2d 841, 852 (C.A. D.C.), certiorari denied, 403 U.S. 923). See *Automobile Club of Michigan* v. *Commissioner of Internal Revenue*, 353 U.S. 180, 183; *Chisholm* v. *Federal Communications Commission*, 538 F. 2d 349, 364 (C.A. D.C.), certiorari denied, 429 U.S. 890. This principle should apply with special force to a new agency assuming statutory responsibilities from a predecessor agency, particularly when the issue involves the new agency's view of how best to shape its own procedures in order to discharge most effectively its statutory functions.

and standards should be adopted and of what compensation, if any, should be awarded to these petitioners. If the court below adheres to its prior conclusion despite the new view taken by the new Commission, this Court will then be in a better position to consider whether the case warrants plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court below vacated, and the case remanded to the court of appeals for reconsideration in the light of the position taken by the Federal Energy Regulatory Commission.

WADE H. MCCREE, JR.,
Solicitor General.

ROBERT R. NORDHAUS,
General Counsel,
Federal Energy Regulatory Commission.

JANUARY 1978.

DOJ-1978-01

APPENDIX

Section 309 of the Federal Power Act, as added, 49 Stat. 858, 16 U.S.C. 825h, provides:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

Section 314(c) of the Federal Power Act, as added, 4 Stat. 861, 16 U.S.C. 825m(c), provides:

> The Commission may employ such attorneys as finds necessary for proper legal aid and service of the Commission or its members in the conduct of the

> work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-481

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

Petitioners,

against

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK, *et ano.*,

Intervenors

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR INTERVENOR, POWER AUTHORITY OF THE STATE OF NEW YORK, IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Question Presented	2
Statutes Involved	2
Statement of the Case	3
Argument	8
I—The court of appeals correctly held that the FPC cannot reimburse petitioners for their attorney's fees absent explicit statutory authorization	10
II—The decision of the court of appeals was not an impermissive invasion of the province of the legislative branch	16
Conclusion	19

TABLE OF AUTHORITIES

	PAGE
Cases:	
Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)	*passim*
Fischer v. United States Department of Transportation, 430 F.Supp. 1349 (D.Mass. 1977)	13
Fitzgerald v. United States Civil Service Commission, 554 F.2d 1186 (D.C.Cir. 1977)	13
Greene County Planning Board v. FPC, 455 F.2d 412 (2nd Cir.) (Greene County I); *cert. denied*, 409 U.S. 849 (1972)	*passim*
Greene County Planning Board v. FPC, 490 F.2d 256 (2d Cir. 1973) (Greene County II)	5
Greene County Planning Board v. FPC, 559 F.2d 1227 (2d Cir. 1977)	*passim*
Lythe v. Commissioners of Elections of Union County, 541 F.2d 421 (4th Cir. 1976)	13
Trapp v. United States (10th Cir. No. 76-1801, unreported opinion decided January 26, 1977)	12
Turner v. FCC, 514 F.2d 1354 (D.C. Cir. 1975)	12
United States v. Testan, 424 U.S. 392 (1976)	13
Wright v. Jackson, 522 F.2d 955 (4th Cir. 1975)	14
Statutes:	
Act of August 15, 1953, Section 3 (16 U.S.C. §828)	3, 15
Clayton Act (15 U.S.C. §15)	11
Clean Air Act, §304(d)	12
Communications Act (47 U.S.C. §206)	11
Department of Energy Organization Act, P.L. 95-91, 91 Stat. 565	2

	PAGE
Federal Power Act, Section 3(7) (16 U.S.C. §796(7))	2
Federal Power Act, Section 10(e) (16 U.S.C. §803(e))	2, 8, 12, 13, 14, 16
Interstate Commerce Act (49 U.S.C. §16(2))	12
Toxic Substance Control Act (15 U.S.C. §2620(4)(c))	12
Regulation:	
18 C.F.R. §11.20(b)(2), (3)	15, 16
Other Authorities:	
DOE Delegation Order No. 0204-1, 10 C.F.R. §1001	2
FPC Opinion No. 751	5
FPC Opinion No. 751-A	5
The Comptroller General of the United States, Matter of Costs of Intervention, Nuclear Regulatory Commission, B-92288	*passim*
New York Public Authorities Law, Section 1002 (McKinney)	3

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Opinions Below

The opinion of the panel of the Second Circuit, which preceded *en banc* review (App. C of Pet.),[1] and the opinion of the Second Circuit *en banc* are both reported at 559 F.2d

1. References to material in the Appendix to the Petition herein will be made in this manner.

1227). The portions of the Federal Power Commission (the "FPC") orders which are relevant to this action are annexed to the Petition as Appendices E and F.

Question Presented

Is the Federal Energy Regulatory Commission[2] (Commission or FERC) authorized by law to reimburse intervenors in a licensing proceeding under Part I of the Federal Power Act for counsel fees and expenses?

Statutes Involved

Section 3 (7) of the Federal Power Act (16 U.S.C. §796 (7)) provides:

> "The words defined in this section shall have the following meanings for the purposes of this act, to wit:
>
> "(7) municipality means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power * * *"

Section 10 (e) of the Federal Power Act (16 U.S.C. §803 (e)) provides, in pertinent part:

> "All licenses issued under this Part [Part I] shall be on the following conditions—

2. The licensing jurisdiction of the Federal Power Commission over hydroelectric projects under Part I of the Federal Power Act was delegated to the Federal Energy Regulatory Commission (the "FERC"), an independent commission in the new Department of Energy (the "DOE") effective October 1, 1977. Department of Energy Organization Act, P.L. 95-91, 91 Stat. 565, DOE Delegation Order No. 0204-1, 10 C.F.R. 1001. To avoid confusion and for the sake of consistency with prior proceedings in this litigation most references herein will be to the Federal Power Commission (the "FPC" or "Commission") rather than to FERC.

> "(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of administration of this Part * * *"

Section 3 of the Act of August 15, 1953 (16 U.S.C. §828 (b)) provides, in pertinent part:

> "The Federal Power Commission in determining the amounts of annual charges applicable to any such project [owned by a State or municipality] may determine the annual charges with reference to the actual cost of services incurred by the Commission with respect to the project."

Statement of the Case

Power Authority of the State of New York ("Authority") is a political subdivision of the State of New York (New York Public Authorities Law §1002, McKinney) which qualifies it as a "municipality" under Section 3(7) of the Federal Power Act. On August 15, 1968 the Authority filed an application with the Federal Power Commission for a license under Part I of the Federal Power Act to construct, operate and maintain a pumped storage power plant to be located in the Towns of Blenheim and Gilboa in Schoharie County, New York (the Blenheim-Gilboa Project) including three transmission lines connecting the project to the inter-connected grid in New York State.

The Commission on June 6, 1969 issued a license for the Blenheim-Gilboa Project (Power Authority of the State of New York, Project No. 2685) but requested more detailed information on the transmission lines. There-

able fees and expenses. The court denied the request noting that it could not make such an award "without a clearer congressional mandate", 455 F.2d 412, 426.

A further interlocutory petition for review to the Second Circuit by petitioners, again seeking reimbursement for fees, among other things, was denied in 1973. *Greene County Planning Board* v. *FPC*, 490 F.2d 256 (2d Cir. 1973) (*Greene County II*).

On January 29, 1976 the FPC in Opinion No. 751, *Power Authority of the State of New York Project No. 2685*, approved the transmission line and found on the basis of *Greene County I* (*supra*) and this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) that it had no authority to award counsel fees and expenses to intervenors. The Commission stated that while the intervenors had:

> "* * * every right to present their case as have countless other intervenors in cases before the Commission * * * [t]hese intervenors are protecting their own interests, and we see no reason to grant them fees and expenses. If they were generally allowed, a large financial burden would be imposed on this Commission and the taxpayer or upon the utility involved and inevitably upon its ratepayers. In the absence of a mandate in the statute we are loath to attempt such an expensive departure from past practice" FPC Opinion No. 751, p. 21, App. E of Pet. at 41a.

In denying petitions for rehearing the Federal Power Commission again rejected the argument that the Commission or applicant should reimburse the intervenors for fees and expenses. FPC Opinion No. 751-A, April 27, 1976, App. F of Pet. at 42a.

after on November 24, 1969 the Authority filed with the Commission an application for approval of exhibits depicting the locations of the three transmission lines.

In May 1970 leave to intervene in the proceeding with respect to the line from the Blenheim-Gilboa Project to Leeds (a substation located near Catskill, New York) approximately 30 miles from the project, was granted to petitioner herein, Town of Durham, Association for the Preservation of Durham Valley and Greene County Planning Board. A year later the Town of Greenville was granted intervention.

Several of the intervenors, including the Town of Durham and the Association for the Preservation of Durham Valley, filed motions with the Administrative Law Judge and subsequently with the Commission asking that the Commission, or alternatively the Authority pay intervenors' expenses including counsel's fees in the proceeding. The motions were denied by the examiner and by the Commission.

In 1971 hearings on the location and design of the transmission line were interrupted by petitions by petitioners herein, Greene County Planning Board, Town of Durham and Association for the Preservation of Durham Valley to the Court of Appeals for the Second Circuit to review orders of the Commission. These petitions resulted in the decision in *Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir.) *cert. denied*, 409 U.S. 849 (1972) (*Greene County I*) which, among other things, denied the instant petitioner's request for an order requiring the Commission or in the alternative the Authority to pay their reason-

On September 27, 1976 the intervenors petitioned the Court of Appeals for the Second Circuit for review of the January 29, 1976 FPC decision including the issue of reimbursement for counsel fees and expenses of the intervenors.

On December 8, 1976 a panel of the court unanimously affirmed the determination of the FPC permitting construction, operation and maintenance of the transmission line, but by a two to one vote remanded the fee issue to the Commission for reconsideration in the light of a recent decision of the Comptroller General that the General Accounting Office would not disallow payment of intervenors' expenses in Nuclear Regulatory Commission proceedings even though Congress had not specifically authorized it.

Judge Van Graafeiland in a vigorous dissent from the decision as it applied to the fee issue, stated:

> "I can find no statute which empowers the Comptroller General to issue what is in effect a declaratory judgment clothing the Federal Power Commission with authority to disburse public funds, in the face of the Commission's own determination that it has no such power and this Court's finding in support thereof." 559 F. 2d 1227, 1236; App. C of Pet. at 31a.

Petition for rehearing *en banc* was made by the instant petitioners, Greene County Planning Board and Town of Greenville, on the issue of construction and operation of the transmission line and a petition for rehearing *en banc* on the question of fee and expense reimbursement was made by the FPC. The petition of the FPC was granted and that of Greene County Planning Board and Town of

Greenville was denied on February 15, 1977. By a vote of five to three (two judges not participating) the court of appeals reversed the panel's decision and denied the petition for review on the issue of fees. 559 F.2d 1227, 1238; App. A of Pet. at 1a.

The court, per Judge Graafeiland, based its decision on the *Greene County I* decision which held that the Federal Power Act did not authorize the award of counsel fees (*Id.* at 1239, App. A of Pet. at 5a) and this Court's clear language in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 257 that "absent statute or enforceable contract, litigants pay their own attorneys' fees". 559 F.2d 1227, 1240; App. A of Pet. at 6a. That the Comptroller General opined otherwise was not considered controlling by the court, which held that given the relevant statutes and the limited scope of the Comptroller's legislative mandate, the court's and not the Comptroller's interpretation of the law must control. *Id.* at 1238-9; App. A of Pet. at 4a & 5a. Judge Van Graafeiland, summed up for the majority:

> "The authority of a Commission to disburse funds must come from Congress, * * * and it is for Congress, not the Comptroller General, to set the conditions under which payments, if any, should be made. No officer or agent of the United States may disburse public money unless authorized by Congress to do so." *Id.* at 1239, App. A of Pet. at 6a.

Argument

The issue as to whether the FPC is authorized to reimburse intervenors in Commission proceedings under Part I of the Federal Power Act for their counsel fees and expenses is not novel, unique or worthy of the grant of the extraordinary writ of certiorari. The question is controlled by this Court's 1975 decision in *Alyeska Pipe Line Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) and the earlier holding of the Court of Appeals for the Second Circuit in *Greene County I, Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972). Petitioner's analysis of the statutes and decision attempts to create an issue worthy of review by the Court. The analysis is forced and strained and no worthy issues have been developed. Nor is there any conflict in decisions among the courts of appeals. To the contrary, recent decisions of the courts of appeals for the Tenth Circuit and the District of Columbia Circuit are in complete agreement with the decision below.

Petitioners have drawn an illusory distinction between "fee reimbursement," said by the Comptroller General to be permissible, and "fee shifting," condemned by this Court in *Alyeska* by arguing that the fee will be paid by the FPC, not by the applicant in the proceeding. But by reason of Section 10(e) of the Federal Power Act, 16 U.S.C. §803(e), which requires licensees to pay the cost of administering proceedings under Part I, the cost of funding intervenors' expenses in the instant case would be borne directly, in large part, by the Power Authority. This is

precisely the type of congressionally unauthorized fee shifting so explicitly condemned by this Court in *Alyeska*.

The requirements of the statutes are clear and thus upon these facts the decision of the Second Circuit was manifestly correct and indeed compelled by that court's prior holding in *Greene County I*. Therefore the "issue" by which intervenors attempt to establish their right to a writ of certiorari has been in fact fully resolved by previous decisions of this and other courts.

Petitioners also assert that certiorari should be granted to resolve "confusion" among Executive agencies on the issue of intervenor financing. Pet. at 15. Review of this case must turn on the *specific legislation* governing the FPC in such licensing proceedings, and can shed no light on whether Congress has legislatively mandated reimbursement or shifting of fees in proceedings before other agencies. And, in fact, Congress has before it at least three bills on intervenors' costs in administrative proceedings. See S. 270; H.R. 336 and H.R. 3362. As the Second Circuit *en banc* providently held in the case at bar, "* * * a finding that the Federal Power Commission is empowered to reimburse intervenors for their legal expenses must await appropriate Congressional action." 559 F.2d 1227, 1240; App. A of Pet. at 6a.

I

THE COURT OF APPEALS CORRECTLY HELD THAT THE FPC CANNOT REIMBURSE PETITIONERS FOR THEIR ATTORNEY'S FEES ABSENT EXPLICIT STATUTORY AUTHORIZATION.

The court of appeals *en banc* correctly held that the FPC has no authority to award expenses and fees to intervenors in proceedings under Part I of the Federal Power Act and that the Comptroller General's determination that it would not disallow such payments does not provide such authority.

Contrary to the position of petitioners and the minority of the Second Circuit *en banc*, the Comptroller General's February 19, 1976 letter, *Matter of Costs of Intervention, Nuclear Regulatory Commission*, B-92288 (App. G of Pet.) and a subsequent letter from the Comptroller to the Oversight and Investigations Subcommittee of the House of Representatives Committee on Interstate and Foreign Commerce (App. H of Pet.) do not provide the necessary *Congressional* determination that the award of counsel fees by the Federal Power Commission would be justified. The Comptroller's opinion merely states that in reviewing the accounts of the NRC he will not question such payments if they were awarded to an intervenor who was found by that agency to have rendered assistance in the proceeding and who was determined to have been indigent.

The letter to the Subcommittee expands the application of the NRC letter to other agencies including the FPC despite the fact that the Comptroller did not solicit the views of the agencies concerned and that he rendered the

opinion only on the basis of "* * * some of the statutory and/or regulatory authorities which authorize or direct that public hearings be held for a variety of purposes related to accomplishment of the agency mission" (App. H of Pet. at 77a). This cursory review by the Comptroller is certainly not, nor could it be, the clear congressional mandate which would authorize the FPC to make awards to intervenors with impunity. That the Comptroller would not object does not clothe the payment with legislative authority which the FPC would require to make the payments in the first instance.

In *Greene County I* the court of appeals rejected petitioners' prayer for financial assistance and upheld the Commission's ruling that the Federal Power Act contained no authority to award such funds, stating:

> "[W]e find ourselves in agreement with the Commission's position that at this posture of the proceedings and under current circumstances, without a clearer congressional mandate we should not order the Commission or PASNY to pay the expenses and fees of petitioners, either as they are incurred or at the close of the proceedings. * * * We would need a far clearer congressional mandate to afford the relief requested, especially in dealing with counsel fees, when Congress has not hesitated in other circumstances explicitly to provide for them when to do so was in the public interest." 455 F. 2d 412 at 426

Further the court explained that when Congress has found it to be in the express public interest to authorize administrative agencies to pay counsel fees it has not hesitated to do so with an explicit direction, as in the Clayton Act, 15 U.S.C. §15; the Communications Act of

1934, 47 U.S.C. §206; and the Interstate Commerce Act, 49 U.S.C. §16 (2).

Since the decision in *Greene County I*, Congress has enacted statutes specifically authorizing some agencies to pay counsel fees. See Toxic Substance Control Act, 15 U.S.C. §2620 (4) (c); Clean Air Act, §304 (d). No similar legislation enabling the FPC to make such payments has been enacted.[3]

Subsequent to *Greene County I* this Court decided *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) which, with *Greene County I* was relied upon by the FPC in rendering its order. The *Alyeska* case, which involved environmental challenges to the issuance of permits for the construction of the trans-Alaska oil pipe line, restated the basic "American Rule" applicable to judicial proceedings in the United States that absent a statute or enforceable contract litigants must pay their own counsel fees. 421 U.S. 240, 257.

Alyeska has been held fully applicable to proceedings before federal administrative agencies. In *Turner* v. *FCC*, 514 F.2d 1354 (D.C. Cir. 1975), the court held that the Federal Communications Commission (FCC) could not properly order a licensee to reimburse the legal fees of a complainant without a grant of "clear statutory power" by Congress. 514 F.2d 1354, 1356. As discussed, *infra*, the effect of Section 10(e) of the Federal Power Act is to shift an award of attorney's fees onto licensees.

3. Three bills dealing with the subject of federal agency intervenors' costs collectively known as the "Public Participation in Federal Agency Procedures Act of 1977", S.270, H.R. 3361 and H.R. 3362, are now before the Congress.

But even apart from Section 10(e), it is established that agency reimbursement of legal expenses is equally precluded, absent plain statutory authorization. In *Fitzgerald* v. *United States Civil Service Commission*, 554 F.2d 1186 (D.C. Cir. 1977), the court reversed a district court judgment holding that the Civil Service Commission had authority to reimburse a participant for legal fees in proceedings before it. Relying on *Alyeska*, *supra*, and *United States* v. *Testan*, 424 U.S. 392 (1976), the court concluded:

> "The import of *Alyeska* and *Testan*, we believe, is that a general waiver of sovereign immunity should not be construed to extend to attorney's fees unless Congress has clearly indicated that it should." (554 F.2d 1186, 1189).

The court of appeals for the Tenth Circuit reached the same conclusion in *Trapp* v. *United States* (10th Cir. No. 76-1801, unreported opinion decided January 26, 1977) which emphasized that where Congress has authorized an agency to award attorney's fees it has done so "in no uncertain terms" (sl. op. at 4). *See also Fischer* v. *United States Dep't. of Transportation*, 430 F.Supp. 1349, 1352 (D. Mass. 1977) declining to do "by forced construction what Congress could have done in a specific statute."

As pointed out in *Lythe* v. *Commission of Elections of Union County*, 541 F.2d 421, 424 (4th Cir., 1976) the Supreme Court in *Alyeska* "specifically recognized that it was for the Congress to select, by statutory authorization, those types of actions in which attorney's fees should be awarded."

In view of *Alyeska* and its progeny, the decision of the court of appeals below was indisputably correct and in accord with decisions of the other circuit courts of appeals. Accordingly, petitioners' request for certiorari has no basis.

That a litigant has in some fashion provided a "public benefit" provides no valid basis for an award of counsel fees. As stated in *Wright* v. *Jackson*, 522 F.2d 955 (4th Cir., 1975) "so far as the award of counsel fees on a public benefit basis is concerned: it is not to be done" 522 F.2d at 957.[4]

Petitioners argue that the case at bar involves a novel question of law upon which this Court has not yet but should rule (Pet. at 19). This proposition relies on an asserted distinction between "fee shifting" as conclusively treated in *Alyeska*, and fee "reimbursement", as condoned by the Comptroller General.

Petitioners attempt to distinguish *Alyeska* by citation of the opinion of the Comptroller General which held that an administrative agency can reimburse a prevailing litigant for his expenses on the ground that such "reimbursement" is distinguishable from "fee shifting" because it involves no exercise of compulsion against a private party (App. G of Pet. at 64a). Even assuming *arguendo* that the suggested dichotomy has merit with respect to agencies such as the NRC, it has no application in the FPC's statutory context. Section 10(e) of the Federal Power Act shifts the cost of administering Part I of that Act squarely

4. The alleged benefit here is the selection of a possible better route than might have been chosen absent the intervenors. Petitioner, Greene County, provided no input to route selection, being concerned entirely with preventing the construction of any line.

on licensees thereunder, such as Power Authority,[5] by the imposition of annual charges. Therefore, if payments to intervenors are authorized, such payments would result in increased costs of administration and consequently increased license fees. Thus, payments to intervenors would involve "fee shifting" which was specifically proscribed by the Supreme Court in *Alyeska*.

Licensees and applicants are compelled to pay annual charges to the United States Treasury and it matters not that the FPC would make the payments to intervenors rather than licensees or applicants paying them directly. The exercise of a compulsion against a private person or against the FPC has the same result, the funds of one litigant are paid to his opponents in an adjudicated matter. The fee is shifted no matter what the route and this is not allowed under *Alyeska*.

Petitioners argue that if fee shifting would occur in Part I proceedings such shifting would be *de minimis* with respect to "all taxpayers or all agency licensees" (Pet. at 20 n.17). The facts in the instant case belie this analysis. Power Authority with three major hydroelectric projects licensed under Part I is the largest single state or municipal licensee under that Part in terms of authorized

5. Pursuant to Section 3 of the Act of August 15, 1953 (16 U.S.C. §828b, Power Authority along with all other State and municipal licensees under Part I of the Act pays annual charges to the Commission to cover the costs of administration of that Part with respect to such licensees in the proportion that the total authorized installed capacity in horsepower of each licensee's facilities bears to the aggregate installed capacity of all projects owned by all State and municipal licensees. 18 C.F.R. §11.20(b)(2), (3) (1976).

capacity in horsepower.[6] The annual charges assessed against the Authority for the year 1976 will total $709,004, which represents approximately 27.5 percent of the total $2,582,328 assessed against all state and municipal licensees under Part I pursuant to Section 10(e) thereof and the Commission's regulations, 18 C.F.R. §11.20 *et seq.* To be sure, in light of this, Authority's financial stake in the award of fees to the petitioners is not miniscule. In any event, *Alyeska* does not turn on the amount of fees claimed. There are no exceptions to the American Rule for *de minimis* situations.

The matter is controlled by this Court's recent ruling in *Alyeska* and by the Second Circuit's holding in *Greene County I*, for which this Court denied certiorari in 1972 (409 U.S. 849).

II

THE DECISION OF THE COURT OF APPEALS WAS NOT AN IMPERMISSIVE INVASION OF THE PROVINCE OF THE LEGISLATIVE BRANCH.

The petitioners treat the Comptroller General's opinion as dispositive of the issue thereby ascribing to him a role as a judicial interpreter of statutes and argue that the

6. St. Lawrence Power Project No. 2000, ... 1,250,000 authorized horsepower
Niagara Power Project No. 2216, ... 2,920,000 authorized horsepower
Blenheim - Gilboa Pumped Storage Project No. 2685 (of which the Gilboa Leeds Transmission line, the subject of the instant litigation, is a part) ..... 1,333,000 authorized horsepower

Second Circuit impermissibly invaded the province of the legislative branch. Petitioners' contention would mean that the Comptroller General would be the final arbiter of legislative interpretations rather than the courts. As pointed out by Judge Van Graafeiland in the majority opinion below, the impact of a Comptroller General's opinion is much more limited and is certainly not final:

> "31 U.S.C. §74 [Section 6 of the Dockery Act of 1894 as amended, Pet. at 3] permits the head of an executive department, in his discretion, to apply to the Comptroller General for a commitment in advance that the General Accounting Office will not question the validity of a specific disbursement in passing upon the account of that department [footnote omitted]. *A commitment given in response to such a request operates as a form of estoppel against subsequent challenge by the GAO. It is not, however, a binding legal opinion, but one which may be contested in the courts. * * * It is for the courts to determine the intent of Congress as expressed in its legislative enactments.* In making this determination, as we do in this case, we interfere in no way with the authority of the Comptroller General to approve or disapprove disbursements made by the executive agencies. *We simply hold that the Federal Power Commission has no statutory authority to make the disbursements in question.*" (Emphasis added) 559 F. 2d 1227, 1239; App. A of Pet. at 4a; 5a.

The practical effect of petitioners' argument that the Comptroller's opinion authorizes the FPC to fund intervenor expenses would be to elevate such opinion to a status superior to the courts' interpretations of Congressional enactments.

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TABLE OF CONTENTS

	PAGE
Statement	1
Discussion	3
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)	3
Federal Maritime Commission v. Seatrain Lines, 411 U.S. 726 (1973)	5
FitzGerald v. U.S. Civil Service Commission, 554 F.2d 1186 (D.C. Cir. 1977)	3
FTC v. Colgate Palmolive Co., 380 U.S. 374 (1965)	5
Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir.) *cert. denied,* 401 U.S. 849 (1972) (Greene County I)	2
Greene County Planning Board v. FPC, 490 F.2d 256 (2d Cir. 1973) (Greene County II)	2
Greene County Planning Board v. FPC, 559 F.2d 1227 (2d Cir. 1977) (Greene County III)	2
Jewel Ridge Coal Corp. v. Local No. 6167, 325 U.S. 161 (1945)	5
Neuberger v. Commission, 311 U.S. 83 (1940)	5
NLRB v. Brown, 380 U.S. 278 (1965)	5
Turner v. Federal Communication Commission, 514 F.2d 1354 (D.C. Cir. 1975)	3
Volkswagenwerk Aktiengesellschaft v. F.M.C., 390 U.S. 261 (1968)	5
Zuber v. Allen, 396 U.S. 168 (1969)	5

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Statement

On January 17, 1978 the Solicitor General filed a brief on behalf of the Federal Energy Regulatory Commission

(FERC) in response to the petition for a writ of certiorari in the above entitled proceeding.*

In its brief the FERC has taken a legal position different from that of its predecessor agency the Federal Power Commission (FPC) with respect to its authority to expend its funds to reimburse intervenors for attorneys' fees in proceedings before it. Consequently, it has requested that this Court grant the petition for a writ of certiorari, vacate the judgment of the court below and remand the case to the court of appeals for reconsideration in the light of the new position taken by the FERC.

As was pointed out by Intervenor, Power Authority of the State of New York, in its main brief in opposition to the petition for a writ of certiorari herein, the present action is the third case to go through the federal courts arising out of the FPC's consideration of Power Authority's Gilboa-Leeds transmission line and the second of such actions which has come before this Court on petition for a writ of certiorari (Br. in Opp., pp. 3-7). *Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir.) *cert. denied*, 409 U.S. 849 (1972) (*Greene County I*); *Greene County Planning Board* v. *FPC*, 490 F.2d 256 (2d Cir. 1973) (*Greene County II*); *Greene County Planning Board* v. *FPC*, 559 F.2d 1227 (2d Cir. 1977) (*Greene County III*, the

* The Federal Energy Regulatory Commission is the successor agency to the Federal Power Commission, respondent below, and is authorized to be substituted for the Federal Power Commission in this litigation by the provisions of Section 705 of the Department of Energy Organization Act, 91 Stat. 565. Under that Act the FERC has assumed most of the functions of the former Federal Power Commission, including jurisdiction over the licensing of certain electric transmission lines under Section 4 of the Federal Power Act (16 U.S.C. 797) which is the subject of this litigation.

instant litigation). The FERC now asks this Court to remand this case to the court of appeals to be relitigated once again.

Power Authority submits herewith its response in opposition to the brief for the Federal Energy Regulatory Commission.

Discussion

Neither the new position ostensibly taken by the FERC nor the fact that it is a legally separate entity created to carry out the same powers and functions of the former FPC changes in any respect the legal principles involved which compelled the court of appeals to hold that the then Federal Power Commission did not have legal authority to reimburse intervenors in proceedings before it for their attorneys' fees.

The court of appeals held that absent a clear statutory authority or congressional mandate, FPC is not authorized to make any award of counsel fees to intervenors. The fact that the Comptroller General or the FERC may decide or opine that the award of such fees is either necessary or proper does not provide the necessary congressional mandate and statutory authority which is required by the well settled "American Rule" that absent an enforceable contract providing otherwise litigants must pay their own counsel fees. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); *Turner* v. *Federal Communication Commission*, 514 F.2d 1354 (D.C. Cir. 1975); *FitzGerald* v. *U.S. Civil Service Commission*, 554 F.2d 1186 (D.C. Cir. 1977).

Nothing raised in the FERC's brief justifies a rejection of the well settled "American Rule."

The Solicitor's brief suggests that the new position of the FERC creates a "reasonable possibility that the court of appeals would view the matter differently in light of the view held by the new Commission . . ." (FERC Br. at 7). There is no valid basis for this conclusion. The court of appeals decided the issues below solely on the basis of well established law and not upon the Commission's determination as to its permissible action. The two interpretations just happened to coincide. Now the FERC has interpreted the same statutes which were interpreted by its predecessor and has reached a different conclusion. It has neither stated a basis for such a dramatic reversal in position, nor has it demonstrated why the position of the FPC and the decision of the court of appeals are erroneous. Nothing in the Commission's alleged new position changes the law as stated by the court of appeals that the FPC had no legal statutory authority to award intervenors' counsel fees and no intervening statutory authority enlarges the power of its successor agency with respect to this issue.

The government's brief also suggests that the court of appeals may view the matter differently since it may have been influenced by the fact that the FPC had allegedly "'never deemed itself authorized' to award compensation for attorneys' fees, and on the principle that '[t]his interpretation of the Federal Power Act by the agency charged with its administration is entitled to great deference from this Court' (Pet. App. pp. 4a-5a, N.2)." (FERC Br. at 17).

The quoted material in the government's brief is contained in a footnote used by the majority below to illustrate the difference of opinion concerning the appropriateness of awarding counsel fees between the Comptroller General and the then FPC.

The majority held that the court's interpretation of the Federal Power Act must control and the court held that "the Federal Power Commission has no statutory authority to make the disbursements in question" (Pet. App. at 5a). The holding of the court below was based solely on the lack of statutory authority for the FPC to reimburse intervenors absent a clear congressional mandate. The court of appeals did not base its determination upon a factual question of whether the FPC had determined it had the authority to award counsels' fees.

The FPC's opinion of its own powers is irrelevant in light of the decision of the court of appeals based upon the court's interpretation of the statute. As this Court has held, despite what an administrative agency may decide in interpreting its own statute, the courts are the final authorities on issues of statutory construction. *FTC* v. *Colgate Palmolive Co.*, 380 U.S. 374, 385 (1965); *NLRB* v. *Brown*, 380 U.S. 278, 291-292 (1965); *Zuber* v. *Allen*, 396 U.S. 168, 192-193 (1969); *Volkswagenwerk Aktiengesellschaft* v. *F.M.C.*, 390 U.S. 261, 272 (1968). *See, Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726 (1973). An administrative interpretation, such as the new interpretation of the statutes by the FERC, must fall where clearly unsanctioned by law or in conflict with judicial decision. *Jewel Ridge Coal Corp.* v. *Local No. 6167*, 325 U.S. 161, 169 (1945); *Neuberger* v. *Commission*, 311 U.S. 83, 88-89 (1940).

The FERC cites no cases from any other circuit court, nor has the Power Authority found any such decisions, which conflict with the lower court's decision and which might warrant further review of the much-litigated issues involved in this action.

Conclusion

It is consequently not necessary to give the court below an opportunity to consider the issues in the "new light" of the changed position of the FERC and for the reasons stated above, the petition for certiorari should be denied in all respects or in the alternative the decision of the court of appeals sitting *en banc* should be summarily affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-481

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY, *Petitioners*,

against

FEDERAL POWER COMMISSION, *Respondent*,
POWER AUTHORITY OF THE STATE OF NEW YORK, ET ANO., *Intervenors*.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Pacific Legal Foundation hereby respectfully moves pursuant to this Court's Rule 42 for leave to file its brief *amicus curiae* in opposition to the petition for a writ of certiorari. Consent was sought from all parties. The Federal Energy Regulatory Commission, formerly the Federal Power Commission, and the Power Authority of the State of New York gave their

consent to the filing of this brief. The petitioners did not. All of these documents have been filed with the Clerk.

The accompanying brief urges this Court to deny the petition for a writ of certiorari to the United States Court of Appeals in the matter of *Greene County Planning Board, et al.* v. *Federal Power Commission, et al.*, No. 77-481.

Pacific Legal Foundation is a non-profit, tax exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens. The Board evaluates the merits of any contemplated legal action and authorizes such legal action when the Foundation's position has broad support within the general community. The Board of Trustees, upon evaluation of this matter, has determined that substantial questions affecting the public interest are involved here and has approved of the Foundation's filing a brief in opposition to the petition for certiorari.

The Foundation, as a public interest organization, essentially favors public participation in administrative proceedings. Moreover, because the Foundation frequently participates in agency proceedings, it stands to benefit financially from the use of government funds to pay for public participation. However, absent clear statutory authority, agencies cannot use federal funds to compensate voluntary intervenors. To do so would represent an improper expenditure of federal funds. Such an expenditure would reflect a

subsidization of particular points of view, an action without statutory authorization by Congress.

Over 20,000 individuals, directly or through associations and firms, support the Foundation's activities. As citizens and taxpayers they have a deep concern about the expenditure of federal monies according to the law. These individuals compose a public that is just as affected by this litigation as the petitioners in this case. The Foundation, moreover, has filed extensive written comments on this issue with federal agencies. It also filed a brief *amicus curiae* with the Second Circuit Court of Appeals in this case. For these reasons, and because Pacific Legal Foundation is an active public interest organization which stands to benefit financially from the position advocated by the petitioners, the Foundation's participation will assist the Court in giving full consideration to opposing public interest viewpoints on the issues presented in this case.

Accordingly, Pacific Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae.*

Respectfully submitted,

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INDEX

	Page
INTEREST OF AMICUS	1
ARGUMENT	2
I. The Court of Appeals Correctly Held That The Authority To Subsidize Particular Points Of View Must Come From Congress	2
II. Congress Has Chosen Not To Provide General Authority To Use Public Funds To Reimburse Intervenors In These Agency Proceedings	5
CONCLUSION	7

TABLE OF AUTHORITIES CITED

CASES:

Alyeska Pipeline Service Co. v. *Wilderness Society,* 421 U.S. 240 (1975) 3, 4, 5
Curtis Wright Corp. v. *McLucas,* 381 F. Supp. 657 (D.N.J. 1974) 3
Fischer v. *United States Department of Transportation,* 430 F. Supp. 1349 (D. Mass. 1977) 4
Fitzgerald v. *United States Civil Service Commission,* 554 F.2d 1186 (D.C. Cir. 1977) 3
Greene County Planning Board v. *Federal Power Commission,* 559 F.2d 1227 (2d Cir. 1976) 7
Keco Industries, Inc. v. *Laird,* 318 F. Supp. 1361 (D.D.C. 1970) 3
Lytle v. *Commission of Elections,* 541 F.2d 421 (4th Cir. 1976) 4
Mulry v. *Driver,* 366 F.2d 544 (9th Cir. 1966) 2
Royal Indemnity Co. v. *United States,* 313 U.S. 289 (1941) 5
Trapp v. *United States* (10th Cir. No. 76-1801, unreported decision decided Jan. 26, 1977) 4
Turner v. *FCC,* 514 F.2d 1354 (D.C. Cir. 1975) 3
United States v. *Stewart,* 234 F. Supp. 94 (D.D.C. 1964), *aff'd.* 339 F.2d 753 (D.C. Cir. 1964) 2
Wheelabrator Corp. v. *Chafee,* 455 F.2d 1306 (D.C. Cir. 1971) 2

Page

UNITED STATES CONSTITUTION:

Article IV, § 3, Cl. 2 5

STATUTES:

Administrative Procedures Act, 5 U.S.C. § 706 (Supp. V, 1970) 2

Magnuson-Moss Warranty - FTC Improvement Act, 15 U.S.C. §§ 57a(h), 57c (Supp. IV, 1974) 6

Toxic Substances Control Act, 15 U.S.C.A. §§ 2605(c)(4), 2628 (Supp. 1977) 5

31 U.S.C. § 665(a) (1970) 5

PENDING LEGISLATION:

S. 270, 95th Cong., 1st Sess. (1977) 6

H.R. 3361, 3362, 95th Cong., 1st Sess. (1977) 6

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BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTEREST OF AMICUS

Pacific Legal Foundation is a non-profit, tax exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. The background and interests of the *amicus* are detailed in the preceding motion for leave to file this brief.

ARGUMENT

I. The Court of Appeals Correctly Held That the Authority To Subsidize Particular Points of View Must Come From Congress.

The Administrative Procedures Act provides that "[t]o the extent necessary to decision . . . the reviewing court shall decide all relevant questions of law" and shall "hold unlawful and set aside agency action in excess of statutory jurisdiction, authority, or limitations . . . ." 5 U.S.C. § 706 (Supp. V, 1970). *See also Mulry* v. *Driver,* 366 F.2d 544, 549 (9th Cir. 1966). In the exercise of this authority, the Second Circuit ruled that the Federal Power Commission did not have statutory authority to use federal funds to pay the petitioner intervenors, and in so doing overruled the opinions of the Comptroller-General.

Opinions of the Comptroller-General are not immune to being overturned by the courts. In *United States* v. *Stewart,* 234 F. Supp. 94 (D.D.C. 1964), *aff'd,* 339 F.2d 753 (D.C. Cir. 1964), the district court stated:

> The Comptroller General is *not* a law officer. He does not render legal opinions . . . . Technically a decision of the Comptroller General upon a question so submitted to him, is not a legal opinion, but a ruling or an announcement that if certain payments were made by disbursing officers in the future, they would be passed or disallowed.

234 F. Supp. 94, 100 (emphasis added). A commitment given by the Comptroller-General in response to such an agency request operates as a form of estoppel against a subsequent challenge by the Government Accounting Office (GAO), but his actions do not operate as a legal or judicial determination of the rights of the parties. *Wheelabrator Corp.* v. *Chafee,* 455 F.2d 1306, 1313

(D.C. Cir. 1971); *Curtis Wright Corp.* v. *McLucas,* 381 F. Supp. 657, 659 n.2 (D.N.J. 1974). The courts, however, have not hesitated to reverse his opinions, even those falling within his historical areas of expertise. *Keco Industries, Inc.* v. *Laird,* 318 F. Supp. 1361, 1363 (D.D.C. 1970).

The opinion of the Court of Appeals, indeed, reinforces the present state of the law. Absent clear statutory authority, opinions of the Comptroller-General cannot furnish a basis for disbursing public funds to voluntary intervenors in agency proceedings. Authorization for such payments must come from Congress. *Turner* v. *FCC,* 514 F.2d 1354 (D.C. Cir. 1975). In *Turner,* the plaintiffs sought reimbursement for legal expenses incurred as a result of their participation in proceedings before the Federal Communications Commission. The District of Columbia Circuit considered the Supreme Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), and ruled that the reasoning of the Supreme Court was applicable to the proceedings before the Federal Communications Commission. The court held that without statutory authority the FCC could not reimburse the plaintiffs. The court reached the same conclusion in *Fitzgerald* v. *United States Civil Service Commission,* 554 F.2d 1186 (D.C. Cir. 1977), when it reversed a district court decision that the Civil Service Commission had authority to reimburse a participant for legal fees in proceedings before it. The court stated:

> The import of *Alyeska* . . . , we believe, is that a general waiver of sovereign immunity should not be construed to extend to attorney's fees unless Congress has clearly indicated that it should.

554 F.2d 1186, 1189.

This same opinion has been expressed in other judicial holdings. The Fourth Circuit held that *Alyeska* "specifically recognized that it was for Congress to select, by statutory authorization, those types of actions in which attorneys's fees should be awarded." *Lytle* v. *Commission of Elections,* 541 F.2d 421, 424 (4th Cir. 1976). In *Trapp* v. *United States* (10th Cir. No. 76-1801, unreported opinion decided Jan. 26, 1977), the court of appeals stated that where Congress has authorized an agency to award attorneys's fees it has done so "in no uncertain terms" (sl. op. at 4). In contrast, the Comptroller-General relies on vague generalities regarding statutory authority to justify his opinion. In *Fischer* v. *United States Department of Transportation,* 430 F. Supp. 1349, 1352 (D. Mass. 1977), the court would not do "by forced construction what Congress could have done in a specific statute."

The petitioners seek to distinguish this case from the principle laid down in *Aleyska* through a tortuous argument that reimbursement here is different because it involves no exercise of compulsion against a private party. This argument is disingenuous at best. In order to pay the costs of voluntary intervenors, the FPC may have to use money from the licensees, because Congress has not appropriated any separate funds for such purposes as reimbursing the petitioners. The licensee may be compelled to pay these fees through higher charges. Petitioners claim that the cost of providing fees to intervenors would be *de minimis,* although they admit that the true cost of such a venture is "unknown." Yet if the agency did not have sufficient funds to reimburse intervenors it may well need to increase its statutory charges. What may start out as *"de minimis"* could easily become a burden to both licensees and other ap-

plicants. The result would be the same as that prohibited by *Alyeska;* the fee is shifted no matter how convoluted the reasoning.

Petitioners seem to believe that by citing extensive agency *proposals* for rulemaking to reimburse intervenors (while apparently overlooking the unanimity found in the courts in the opinions cited above) they will add weight to their plea. How extensive citations of agency proposals legitimize their position or those opinions of the Comptroller-General remains a mystery.

II. Congress Has Chosen Not To Provide General Authority To Use Public Funds To Reimburse Intervenors in These Agency Proceedings.

Only Congress may authorize the expenditure of federal funds, and the release of such funds shall be applied solely to the objects for which they are respectively made and no others. Article IV, § 3, Cl.2 is a constitutional power lodged squarely with Congress. Subordinate officers of the United States are without that power. *Royal Indemnity Co.* v. *United States,* 313 U.S. 289, 294 (1941). Officers and employees of the government are prohibited from involving the government in any obligation for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such federal obligation is authorized by 31 U.S.C. § 665(a) (1970).

Congress has passed specific legislation authorizing reimbursements, along with the necessary appropriations, when it desired to reimburse participants in agency proceedings. Examples of such congressional action are: §§ 6(c)(4) and 29 of the Toxic Substances Control Act, Pub. L. No. 94-469, October 11, 1976, 90 Stat. 2003, *amending* 15 U.S.C.A. §§ 2605(c)(4) and

2628 (Supp. 1977); §§ 202(a)"(h)" and 207 of the Magnuson-Moss Warranty - FTC Improvement Act, Pub. L. No. 93-637, January 4, 1975, 88 Stat. 2183, *amending* 15 U.S.C. §§ 57a(h) and 57c (Supp. IV, 1974). In this last instance, the Comptroller-General had previously ruled that the FTC had the authority to pay voluntary intervenors' costs. In spite of his opinion, Congress passed the bill. During its recent session Congress has had three bills before it regarding reimbursement for voluntary intervenors in administrative proceedings. They are collectively identified as "Public Participation in Federal Agency Procedures Act", S. 270, 95th Cong., 1st Sess. (1977); H.R. 3361 and 3362, 95th Cong., 1st Sess. (1977).

Congress has the institutional role of resolving the question of the allocation of federal funds. The allocation of funds to voluntary intervenors in agency proceedings will provide in essence for the use of public funds to support a private or limited viewpoint, as Chief Judge Kaufman pointed out in the decision below:

> The decision whether to expend public funds to advance an essentially private point of view by its very nature is political and, in a democracy, more appropriately made by the elected representatives of the people. All interested individuals can claim, with utmost sincerity, to represent the "public." Some selection among potential intervenors becomes necessary, therefore, to assure a fair and balanced presentation of the various viewpoints while insuring, at the same time, that the agency does not exceed its financial constraints. Such choices are particularly unamenable to judicial structuring.

Greene County Planning Board v. *Federal Power Commission*, 559 F.2d 1227, 1240 (2d Cir. 1976) (Kaufman, C.J., concurring). Congress has chosen to withhold the general authority for agencies to make expenditures to aid voluntary intervenors. The decision of the Second Circuit Court of Appeals thus fully effectuates congressional intent and policy on this issue.

CONCLUSION

For the above reasons the Court should deny the petition for certiorari or in the alternative grant summary affirmance to the decision of the Second Circuit Court of Appeals sitting *en banc*.

Respectfully submitted,

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